

4-1973

## Indians and Criminal Justice in Early Oregon, 1842-1859

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AN ABSTRACT OF THE THESIS OF JOHN SAMUEL FERRELL for the  
Master of Arts in History presented April 6, 1973.

Title: Indians and Criminal Justice in Early Oregon, 1842-1859

APPROVED BY MEMBERS OF THE THESIS COMMITTEE:

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Indian-white relations in early Oregon are often viewed in terms of warfare and treatymaking, but these are only the most obvious aspects of a larger struggle to resolve cultural conflicts, settle land disputes, and establish order in a new territory. Additional understanding of both white attitudes toward Indians and of Indian exasperation with the settlers may be gained from a study of how criminal justice applied to the red man during the turbulent pre-reservation era.

Prior to the coming of American settlers, Oregon Indians knew the justice of the Hudson's Bay Company. In dealing with persons accused of harming HBC personnel or property, Dr. John McLoughlin acted with firmness and persistence while taking cognizance of the Indians' own ideas of just treatment. The American leaders of later years sometimes imitated McLoughlin's firmness but failed to recognize the importance of Indian tradition. Dr. Elijah White, after being appointed the first U. S. Indian agent for Oregon in 1842, presented the natives with a law code

which largely ignored their own traditions and confused them by making major offenses of what had formerly been viewed as minor infractions.

Dr. White assured his charges that the new law code came from God and was recognized by all civilized nations. A similar smugness was apparent in later leaders who were convinced that court proceedings against Indian troublemakers could not help but make a deep and beneficial impression on the defendants' fellow tribesmen. Such assurance sometimes blinded the whites to inequities in their application of justice to Indian-white disputes and this blindness contributed to friction between the races.

Criminal justice for Indians was a more complex matter during Oregon's territorial period than it had been during the HBC era. To the Indians, the British had been trading partners, but the Americans were dispossessors. A sizeable influx of settlers preceded the signing of Indian treaties, and the presence of two divergent cultures on the same disputed ground made necessary some means of dealing with the disagreements which inevitably arose. But civil officials, army officers, judges, and Indian agents were still working out their respective spheres of influence while new settlers might be many miles away from any established authority and tempted to take the law into their own hands. The belief expressed by leading figures in the army and the Indian Bureau that whites were to blame for outbreaks of violence did not encourage irate settlers or miners to rely on these agencies to settle disputes with Indians, and citizens' courts, miners' committees, or indiscriminate reprisals were often the only forms of "justice" employed.

Indians noted the infrequencies of prosecution for whites who committed crimes against them and complained that the whites had one set of laws for themselves and another for the red man. Adverse public opinion worked against the efforts of Indian

Superintendent Joel Palmer to correct this grievance, and lawyers sometimes questioned whether Indians were, in fact, "persons" or whether their mistreatment could constitute a crime. Even Dick Johnson, a successful Indian farmer who abandoned his native culture and won the support of Palmer and of Jesse Applegate in his efforts to model his life on white men's ideals, had so little legal identity that his suspected murderers were not tried and one of them was allowed to take his farm.

Segregation of land and of peoples was the direction in which both the law and public opinion pointed in Oregon Territory. Consciously and unconsciously, whites encouraged Indians to accept a reservation solution to the problems generated by land-hunger and culture clash, and among these problems legal discriminations and vigilante justice figured prominently. Hatred of the Indians among many of the settlers contributed substantially to distortion and non-application of criminal justice, but even with favorable public opinion, as in the case of Dick Johnson, the law itself was insufficient for an Indian who did not remove himself from white society and accept the treaty protections of the reservation.

INDIANS AND CRIMINAL JUSTICE  
IN EARLY OREGON, 1842-1859

by  
JOHN S. FERRELL

A thesis submitted in partial fulfillment of the  
requirements for the degree of

MASTER OF ARTS  
in  
HISTORY

Portland State University  
1973

**TO THE OFFICE OF GRADUATE STUDIES:**

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## CHAPTER I

### INTRODUCTION

In the spring of 1855, Robert R. Thompson, Indian Agent at The Dalles, was engaged in treaty negotiations with tribal groups in his district. In reporting his program to Oregon Indian Superintendent Joel Palmer, he spoke of his encounter with a stubborn Cayuse chief:

Speaking of our laws, he remarked that he was aware we knew more than they [the Indians] did, but that their knowledge was sufficient for them ... They did not ask the whites for their laws or superior knowledge. All they wanted was to be left alone.<sup>1</sup>

As the chief and his people were learning, such sentiments carried little weight in a period of rapid white settlement. It was not in the nature of the Indian department or of the growing number of settlers to "let alone" the natives of Oregon Territory, and among many trying adjustments demanded by the newcomers was ready acceptance of their forms of criminal justice. As the chief indicated to Indian Agent Thompson, the "superior knowledge" of the settlers was recognized and respected, but the red man was quickly disabused of any notion that such knowledge was necessarily accompanied

<sup>1</sup>Robert R. Thompson to Joel Palmer, April 14, 1855, Oregon Indian Affairs Papers (microfilm), Roll 5, Oregon Historical Society. Cited hereafter as OIA, OHS.



by superior (or even consistent) morality or justice. A court of law was occasionally opened to "savages" as a showcase of civilized practice, but more often such formality was ignored in favor of warfare, vigilantism, or individual reprisals. The frequent hypocrisies and inconsistencies of the white man's justice were not lost on the supposedly savage mind.

Oregon's peculiar background of joint occupation by Britain and the United States led to greater strains on Indian-white relations than was characteristic of the American westward movement. The United States had previously sought to extinguish Indian title and to provide some degree of military protection in frontier areas preceding a large influx of settlers. In Oregon, the situation was somewhat reversed, as a substantial number of Americans arrived before the agreement of June 15, 1846 which granted their government sole title south of the 49th parallel.<sup>2</sup> Only after that date could serious steps be taken toward alleviating Indian-white conflicts over land, and final resolution of these conflicts was not effected until several bloody years had passed in which full-scale warfare and small-scale reprisals taxed the efforts of the Indian bureau, the army, and the civil government to establish order. With their uncertain and sometimes conflicting mixture of military force and criminal justice, these agencies often found themselves in the uncomfortable

<sup>2</sup> Stanley S. Spaid, "Joel Palmer and Indian Affairs in Oregon" (unpublished doctoral dissertation, University of Oregon, 1950), p. 58.

position of seeming to side with the Indians against the whites while, at the same time, being viewed with suspicion by the red man.

Typically, a history of Indian relations in this era of early Oregon settlement emphasizes warfare and treaty-making: the early exposure of the natives to American justice is largely ignored. Yet, a study of the latter subject can be of value in explaining both white attitudes toward the Indian and the Indian's exasperation with the new race in his midst.

## CHAPTER II

### JUSTICE AND THE HUDSON'S BAY COMPANY

The Indians of Oregon had, for some time prior to their difficulties with the "Bostons," been exposed to the workings of criminal justice as practiced by the Hudson's Bay Company. The HBC trader was not burdened with land hunger in his dealings with the Indian, and his role vis-a-vis the native was clearcut and understandable to both parties: the trader desired furs and the Indian desired the material goods which the trader could supply. Thus it was in the interest of the HBC to treat the Indian as a being worthy of respect and to employ a system of justice which would both reflect this respect and be recognized by the Indian as consistent, fair, and virtually infallible.<sup>1</sup>

Under the leadership of Dr. John McLoughlin, the HBC in Oregon made allowance for Indian beliefs and practice when disputes arose between the British and the natives. In 1832, an Indian employee of the company at Fort Walla Walla named Sasty was murdered by a Cayuse,<sup>2</sup> and Dr. McLoughlin reminded his subordinate, Simon McGillivray, that the Indians considered such an offense as little different than killing of a cow

<sup>1</sup>Hubert H. Bancroft, Works, Vol. XXVIII: Northwest Coast, 1800-1846 (San Francisco: The History Co., 1886), p. 538.

<sup>2</sup>John McLoughlin to George Simpson, March 15, 1832, Burt Brown Barker (ed.) Letters of Dr. John McLoughlin (Portland: Binfords and Mort, 1948), p. 258. Cited hereafter as McLoughlin Letters.

or horse: "God forbid that I should mean to justify Murder, but in dealing with Indians we ought to make allowance for their manner of thinking." In the case of Sasty, McLoughlin concluded, the punishment should be left to the Almighty, who would see that justice was done, either in this world or the world to come.<sup>3</sup>

In another instance, the mistress of Francis Ermstinger, a company employee, ran away with an Indian man, and Ermstinger sent an interpreter named Lolo to retrieve the woman and to cut off the tip of one of the man's ears as punishment. The deed was accomplished and McLoughlin justified the act in a letter to the company Governor-in-Chief, George Simpson:

In the civilized World such an act will appear harsh and on that account it would have been preferable that he had resorted to some other mode of punishment. Still, if the Indian had not been punished, it would have lowered the Whites in their Estimation as among themselves they never allow such an offence to go unpunished.<sup>4</sup>

But another man, named William Kitten, went even farther than Ermstinger in adopting native methods of justice and drew harsh disapproval from Dr. McLoughlin:

I was informed here this summer [1830]...that Mr. Kitten had offered two horses to get an Indian killed. Will you have the Goodness to state to Mr. Kitten that the Company will not allow such proceedings and that

<sup>3</sup> McLoughlin to Simon McGillivray, February 27, 1832, McLoughlin Letters, p. 255.

<sup>4</sup> McLoughlin to Simpson, March 20, 1831, McLoughlin Letters, p. 185.

it must not be done -- It is only when Indians have murdered any of the Company's servants or any person belonging to the establishment that we can have a Right to kill the Murderer or get him killed.<sup>5</sup>

Indiscriminate retaliation, as was later so often practiced by the Americans in Oregon, was ordinarily eschewed by the British. If an Indian murdered a company employee, the members of his tribe were reassured of their safety, but made to understand that the suspected felon must be surrendered.<sup>6</sup> When two company employees, Pierre Kakarquiron and Thomas Canaswarette, were killed by a group of Tillamooks in the Spring of 1832, such cooperation was not forthcoming from their tribe, and McLoughlin sent an expedition to the Tillamook country with instructions to settle the matter in the most humane way possible.<sup>7</sup> He desired the men to kill a few members of the tribe as an example of the company's power and determination, then to allow others to escape and bear to their people the message that the company desired only the further deaths of those actually involved in the murders of Kakarquiron and Canaswarette as the price for peace.<sup>8</sup> This policy was carried out, six of the Tillamooks were killed by the HBC expedition (without regard to guilt or innocence),<sup>9</sup>

<sup>5</sup> McLoughlin to William Connolley, July 2, 1830, McLoughlin Letters, p. 109.

<sup>6</sup> Bancroft, XXVIII, 538.

<sup>7</sup> McLoughlin to Michel Laframboise, April, 1832, McLoughlin Letters, p. 268.

<sup>8</sup> McLoughlin to James Birnie, May 15, 1832, McLoughlin Letters, p. 273.

<sup>9</sup> McLoughlin to Samuel Black, May 8, 1832, McLoughlin Letters, p. 270.

and the tribe in this instance was left to punish the remaining murderers as evidence of good faith.<sup>10</sup>

The Hudson's Bay Company fully comprehended the value of consistency in dealing with Indian felons and deliberately cultivated an image of godlike infallibility as a deterrent to crime. The stubborn persistence of the company in tracking down criminals became an object of superstitious awe among Indians.<sup>11</sup> Nevertheless, in Oregon pragmatic considerations could still sometimes outweigh company policy. In the case of the murder of Sasty, McLoughlin decided that business came first:

It appears to me injudicious in us to neglect our business to send a party to punish an Indian who may go out of our reach and if the Tribe are willing to defend him can put us to defiance. But even if we did kill him, it might be the cause of deranging all our business along the Communication.<sup>12</sup>

If the HBC was not always as godlike in its Indian justice as it purported to be, it succeeded to a substantial degree in conveying the toughness tempered with fairness necessary to successful relations with the natives. At least some of the Americans arriving in Oregon looked admiringly at the HBC policy and some imitation of the British methods can be

<sup>10</sup> McLoughlin to Birnie, May 15, 1832, McLoughlin Letters, p. 273.

<sup>11</sup> Bancroft, XXVIII, 538.

<sup>12</sup> McLoughlin to Simpson, May 15, 1832, McLoughlin Letters, p. 258.

seen in the actions taken after the Marcus Whitman and Leander Wallace slayings of the early territorial period.<sup>13</sup> But the relationship which developed between the natives and the Americans was a far more complex one than the fur trading partnership of the HBC era, and, as we shall see, the "Bostons" were much more divided in their notions of justice for Indians than were the "King George Men."

### CHAPTER III

#### ELIJAH WHITE AND THE LAW OF THE "BOSTONS"

When Oregon settlers met at Champoege in July, 1843 and adopted rules for a provisional government, they vowed that "the utmost good faith" should "always be preserved towards the Indians," and provided that "laws founded in justice shall from time to time be made for preventing injustice being done to them."<sup>1</sup>

Later in the same year, L. H. Judson, a justice of the peace in the newly-organized Champoege district, issued a warrant for the arrest of an Indian known as Mishell on the complaint of two citizens, W. H. Gray and Joel Turnam, who accused the Indian of stealing horses. Witnesses were subpoenaed, a twelve man jury was summoned, and the defendant pleaded "guilty to the charge of stealing horses but not guilty of stealing other property or of threatening to kill citizens of this territory." The jury decided there was "strong suspicion of the prisoner's guilt," and he was committed to stand trial before the next session of the new Oregon Supreme Court.<sup>2</sup>

<sup>1</sup>Gustavus Hines, Oregon (Buffalo: George H. Derby and Co., 1852), p. 427.

<sup>2</sup>L. H. Judson, report of hearing in case of Mishell, an Indian, Oregon Provisional and Territorial Government Papers (microfilm), Roll 1, p. 445.



If Mishell ever made his appearance before the supreme court it was not noted in the official record of that body. In fact, the record for the years 1844-1846 makes no mention of any Indian defendants or complainants.<sup>3</sup> This absence was probably due in large part to the efforts of Dr. Elijah White to see that such offenses as Mishell was charged with were handled by the Indians' own tribal leaders.

Dr. White was appointed by President Tyler in 1842 as the first sub-Indian agent for Oregon.<sup>4</sup> The legality of his position was doubted by even some of the American settlers in view of the joint occupation treaty still in effect between the United States and Britain, but White was undeterred and went about the task of visiting various Indian tribes and seeking to improve their relations with the settlers.<sup>5</sup> His efforts to influence the choice of chiefs was a policy which had previously been employed by the Hudson's Bay Company in its own interests,<sup>6</sup> but White's scheme went deeper in its inclusion of a detailed law code which represented the first attempt of Americans west of the Rocky Mountains to teach Indians to govern their internal affairs by alien standards.<sup>7</sup>

<sup>3</sup> Oregon Supreme Court Record (Portland: Stevens-Ness Law Publishing Co., 1938)

<sup>4</sup> Spaid, p. 58.

<sup>5</sup> Ibid.

<sup>6</sup> Thompson to A. D. Pambrun, October 21, 1853, OIA, Roll 13, OHS.

<sup>7</sup> Charles H. Carey, History of Oregon (Chicago and Portland: The Pioneer Historical Publishing Co., 1922), p. 544n.

Its provisions were as follows:

Art. 1. Whoever willfully takes life shall be hung. (sic)

Art. 2. Whoever burns a dwelling shall be hung. (sic)

Art. 3. Whoever burns an out building shall be imprisoned six months, receive fifty lashes, and pay all damages.

Art. 4. Whoever carelessly burns a house, or other property, shall pay damages.

Art. 5. If anyone enter a dwelling, without permission of the occupant, the chiefs shall punish him as they think proper. Public rooms are excepted.

Art. 6. If anyone steal he shall pay back twofold; and if it be the value of beaver skin or less, he shall receive twenty-five lashes; and if the value is over a beaver skin he shall pay back two-fold, and receive fifty lashes.

Art. 7. If anyone take a horse and ride it, without permission or take any article and use it, without liberty, he shall pay for the use of it and receive from twenty to fifty lashes, as the chief may direct.

Art. 8. If anyone enter a field and injure the crops, or throw down the fence, so that cattle and horses go in and do damage, he shall pay damages, and receive twenty-five lashes for every offense.

Art. 9. Those only may keep dogs who travel or live among the game; if a dog kill a lamb, calf, or any domestic animal, the owner shall pay damages and kill the dog.

Art. 10. If an Indian raise a gun or other weapon against a white man, it shall be reported to the chiefs and they shall punish it. If a white man do the same to an Indian, it shall be reported to Doctor White, and he shall punish or redress it.

Art. 11. If an Indian break these laws, he shall be punished by his chiefs; if a white man break them, he shall be reported to the agent, and punished at his instance.<sup>8</sup>

<sup>8</sup> Elijah White, Ten Years in Oregon (Ithaca, N.Y.: Andrus, Gauntlett, and Co., 1850), pp. 189-190.

Although the code included provisions for dealing with capital crimes, it was aimed principally at the kinds of petty crime which most often brought annoyance to the lives of settlers and missionaries.<sup>9</sup> Tribal leaders quickly recognized how much power the code could place in their hands, and acceptance was secured, first from the Nez Perces,<sup>10</sup> then from councils of several other tribes, including the Cayuses, Walla Wallas,<sup>11</sup> Klamaths, and Molallas.<sup>12</sup> The Cayuses hesitated for a time, since Dr. White, for all his show of democracy, had made them feel that a rejection of his laws would be dealt with forcibly by the Americans.<sup>13</sup> An influential chief of the Walla Wallas also had doubts. "Where are these laws from?" asked Peu-peu-mox-mox. "Are they from God or from earth? I would that you might say they were from God; but I think they are from the earth, because, from what I know of white men, they do not honor these laws." Dr. White assured him that the laws were from God and were recognized by all civilized nations.<sup>14</sup>

<sup>9</sup>Hubert H. Bancroft, Works, Vol. XXIX: History of Oregon, 1834-1848 (San Francisco: The History Co., 1886), p. 271.

<sup>10</sup>Ibid., p. 543.

<sup>11</sup>Ibid., p. 546.

<sup>12</sup>Theodore Stern, The Klamath Tribe, A People and Their Reservation (Seattle: University of Washington Press, 1965), p. 25.

<sup>13</sup>Alvin M. Josephy, Jr., The Nez Perce Indians and The Opening of The Northwest (New Haven: Yale University Press, 1965), p. 235.

<sup>14</sup>Hines, p. 179.

What was overlooked by White was how alien some of the provisions of the law code were to Indian tradition. In many tribes, for example, the return of a stolen article had been the only satisfaction required in cases of theft;<sup>15</sup> Nez Perce thieves were additionally burdened with public disgrace.<sup>16</sup> One writer, in studying the earliest records of white men's encounter with Oregon Indians, found evidence of a general aversion to corporal punishment; strenuous objection was sometimes made to instances of white men flogging other whites.<sup>17</sup>

A fusion of tradition and missionary teachings apparently fueled the wrath of the Walla Walla when Chief Peu-peu-mox-mox attempted to punish law breakers with a whip: he was warned that God would surely send him to hell for his actions.<sup>18</sup> A group of Indians later told Dr. White they were willing that flogging should continue if they could receive shirts, pants, and blankets in payment. Dr. White tried to explain that they should expect no payment when their actions merited punishment, but they merely laughed at such a strange notion and departed.<sup>19</sup>

<sup>15</sup>Hubert H. Bancroft, Works, Vol. I: Wild Tribes (San Francisco: The History Co., 1886), p. 240.

<sup>16</sup>Herbert Joseph Spinden, "The Nez Perce Indians," Memoirs of The American Anthropological Association, Vol. II, Part III (1908), 244.

<sup>17</sup>Stern, p. 25.

<sup>18</sup>Hines, p. 179.

<sup>19</sup>Ibid., p. 157.

While some of the newly empowered chiefs (notably Ellis of the Nez Perces), were zealous in enforcing the new law code,<sup>20</sup> it was soon discovered that the promised cooperation on the part of American settlers was not forthcoming. Articles ten and eleven of the code removed white offenders against Indians from tribal jurisdiction with the promise that such offenders would be punished under white men's laws. But, as settlement expanded, so did the anti-Indian aspect of public opinion, and in the years that followed, American officials who conscientiously sought to redress Indian grievances were often helpless in this hostile atmosphere.

Dissatisfaction with the law code and suspicion of the white man's motives were given a tremendous boost with the murder of Elijah Hedding, son of Peu-peu-mox-mox, in 1844. Hedding joined a delegation from several tribes which journeyed to California to purchase cattle. While at Fort Sutter, the Indians became involved in a quarrel and the young Walla Walla chieftain was killed by an American named Grove Cook.<sup>21</sup>

The influence of Chief Peu-peu-mox-mox was widespread and there was soon talk of war against the whites on the Sacramento from the Walla Walla, Cayuse, Spokane, and Nez Perce nations. There was also some sentiment for extending the war to the settlements in the Willamette Valley. Before

<sup>20</sup> Francis Fuller Victor, Early Indian Wars of Oregon (Salem: Frank C. Baker, 1894), pp. 53-58.

<sup>21</sup> Josephy, pp. 240-241.

anything was done however, Peu-peu-mox-mox decided to seek the advice of another great chief, Dr. John McLoughlin.<sup>22</sup>

McLoughlin warned that such a war would be disastrous to the Indians, and they could expect no help from the Hudson's Bay Company. His advice to the Indians was to see Dr. White about securing punishment for the murderer of Elijah Hedding as provided in his law code.<sup>23</sup>

The Indians conferred and selected Ellis, head chief of the Nez Perces, to call on Dr. White. The lawgiver was somewhat taken aback by the request of one of his own handpicked chiefs to honor his promise to the Indians of Oregon. Ellis was royally dined and entertained while Dr. White stalled and tried to find some way out of his predicament. Finally, he sent some letters of complaint to officials in California, but before anything came of this correspondence, he departed for the East and apparently washed his hands of the Indian grievance.<sup>24</sup>

The Elijah Hedding affair smoldered in the hearts of Oregon Indians for years, and a rallying cry in future wars became, "the slayers of the son of Peu-peu-mox-mox were never hanged."<sup>25</sup> Suspicions grew during the 1840's that the law code, which seemed to punish only Indians, was evidence of

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid., pp. 241-243.

<sup>25</sup> Carey, p. 543.

some dark scheme to subjugate them to the white man's will. Suspicions were reinforced with the knowledge that Dr. White had himself brought a large party of emigrants and by Dr. Whitman's threat that he would bring many people to Oregon to punish them for their sins.<sup>26</sup> An atmosphere of distrust arose to set the stage for the Whitman massacre.

<sup>26</sup>Victor, p. 53.

## CHAPTER IV

### THE WALLACE AND WHITMAN MURDER TRIALS

On November 29, 1847, a group of Cayuse Indians casually entered the mission grounds at Waiilatpu. Beneath their clothing were concealed the weapons needed to achieve their object: the deaths of people whom they had grown to believe had evil intentions toward the Cayuse nation. Their surprise attack brought the deaths of Marcus and Narcissa Whitman along with twelve others.<sup>1</sup> A number of other whites at the mission were taken captive and later ransomed through the efforts of Peter Skene Ogden of the Hudson's Bay Company.<sup>2</sup>

Two months after the massacre, the Oregon Spectator published a translated communique from four Cayuse chiefs in which they claimed the Whitmans were killed because they plotted to take the Indians' land and to poison them with medicines. The chiefs asked that the settlers not make war on them and "that they may forget the lately committed murders, as the Cayuses will forget the murder of the son of the Chief of Walla Walla committed in California."<sup>3</sup>

The settlers of Oregon may have cared very little about the death of the son of Peu-peu-mox-mox, but they cared immensely about the deaths of Marcus and Narcissa Whitman and their

<sup>1</sup>Oscar O. Winther, The Great Northwest (2d ed.; New York: Alfred A. Knopf, 1956), p. 152.

<sup>2</sup>Ibid., p. 153.

<sup>3</sup>Oregon Spectator, (Oregon City), January 20, 1848.



companions at Waillatpu. The massacre was not only tragic and shocking in itself but seemed to threaten a similar fate for all settlers in the isolated and still unorganized territory. A committee, composed of Jesse Applegate, Asa L. Lovejoy, and George L. Curry, was formed to raise funds for the anticipated war with the Cayuses, and on December 13, 1847 they made their plea for support in a letter addressed to "the Merchants and Citizens of Oregon":

It is a fact well known to every person acquainted with the Indian character, that by passing silently over their repeated thefts, robberies, and murders of our fellow-citizens, they have been emboldened to the commission of the appalling massacre at Waillatpu. They call us women, destitute of the hearts and courage of men, and if we allow this wholesale murder to pass by as former aggressions, who can tell how long either life or property will be secure in any part of this country, or what moment the Willamette will be the scene of blood and carnage.<sup>4</sup>

Some officers of the Hudson's Bay Company were joined by former mountain men and a few settlers in urging adherence to the HBC tradition by using the new volunteer militia strictly for the capture of the guilty individuals. They were countered by others who favored a war of extermination against the Cayuse tribe. A peace commission was, in fact formed, consisting of Joel Palmer, Robert Newell, and Henry A. G. Lee, but the commission was hampered by men of less pacific temperament and open warfare soon followed.<sup>5</sup> The

<sup>4</sup>La Fayette Grover (compiler), The Oregon Archives (Salem: Asahel Bush, 1853), p. 324.

<sup>5</sup>Charles M. Gates and Dorothy O. Johansen, Empire of The Columbia (2d ed. New York: Harper and Row, 1967), p. 233.

object was still ostensibly the capture of the guilty parties, but as the newly-appointed territorial governor, Joseph Lane explained it, "the whole tribe will be held responsible until those, whoever they may be, concerned in that melancholy and horrible affair are given up for punishment."<sup>6</sup>

Before the Cayuse nation was induced by force of arms to surrender individuals for trial, Lane and the new territorial government were given another opportunity to use justice as an object lesson for the red man. On the last day of April 1849,<sup>7</sup> Leander C. Wallace, an American settler, was killed when Snoqualmich Indians made an unsuccessful attack on Fort Nisqually, the HBC station on Puget Sound.<sup>8</sup> American settlement in that region was still sparse<sup>9</sup> and three other citizens of Lewis County petitioned Lane to take stern measure against the Indians before others suffered the fate of Wallace.<sup>10</sup>

Governor Lane, who was at that time doubling as ex-officio Superintendent of Indian Affairs for Oregon Territory,<sup>11</sup>

<sup>6</sup> Charles M. Gates and Priscilla Knuth (eds.), "Oregon Territory in 1849-1850," Pacific Northwest Quarterly, L (January, 1949), 12.

<sup>7</sup> Joshua Lewis, T. Simmons, and Stephen Walker to Joseph Lane, April 31, 1849, OIA, Roll 12, OHS.

<sup>8</sup> Carey, p. 560.

<sup>9</sup> Lane to Secretary of War, October, 1849, OIA, Roll 2, OHS.

<sup>10</sup> Lewis, Simmons, and Walker to Lane, April 31, 1849, OIA, Roll 12, OHS.

<sup>11</sup> C. F. Coan, "Federal Indian Relations in The Pacific Northwest, 1849-1852," Oregon Historical Quarterly, XXII (March, 1921), 52.

reacted to the news from Puget Sound promptly. A company of regular army forces was stationed at Fort Steilacoom<sup>12</sup> and Lane asked Dr. William F. Tolmie, head of the HBC operation at Fort Nisqually, to explain to the Indians that one more incident like the Wallace killing would mean their "complete destruction."<sup>13</sup> The governor later claimed that he intended as his next step to make a personal visit to the Sound and to boldly demand of the Snoqualmich tribe the surrender of the murderers for punishment,<sup>14</sup> but he was frustrated in his goal by the actions of J. Quinn Thornton, one of two newly-appointed sub-Indian agents for Oregon.<sup>15</sup> Thornton conceived the idea of offering a bribe to the Snoqualmichs for the surrender of the killers. He asked the advice of two of the American settlers at Puget Sound and also consulted with Dr. Tolmie of the HBC before making the decision to contact the head chief of the Snoqualmich tribe and attempt to arrange a deal.

In his talk with the chief, Thornton "sought to convince him of the existence of a sincere desire to avoid confounding the innocent with the guilty." For this reason, said Thornton, it would be in the interests of both sides to avoid warfare, and if the tribe would surrender the offenders to the army

<sup>12</sup> Ibid., pp. 50-51.

<sup>13</sup> Lane to William F. Tolmie, May 17, 1849, OIA, Roll 2, OHS.

<sup>14</sup> Lane to Secretary of War, October, 1849, OIA, Roll 2, OHS.

<sup>15</sup> Carey, pp. 560-561.

within three weeks, they would be rewarded with a gift of eighty blankets. In case the Snoqualmichs did not comply within the time limit set by the sub-agent, he authorized Captain B. Hill of the army to double the reward and offer it to any tribe in the region resourceful enough to capture the guilty parties.<sup>16</sup>

After making the foregoing arrangements, Thornton informed Lane of his actions. He justified the seemingly large reward with the claim that the cost of eighty blankets was far less than the cost of single day's preparation for a war with the Indians which would surely involve the innocent as well as the guilty. The sub-agent would take full responsibility for his unauthorized arrangements and depend on the results to justify him.<sup>17</sup>

Governor Lane was incensed by the actions of his well intentioned subordinate. He strongly opposed bribery as a policy in such cases for two reasons:

First, it holds out inducements to the Indians for the commission of murder by way of speculation, for instance, they would murder some Americans, await the offering of a large reward...could deliver up some of their slaves as the guilty; for whom they would receive ten times the amount that they would otherwise get for them.

Second, it has a tendency to make them underrate our ability to chastise by force or make war upon them for such conduct; which in my opinion is the only proper method of treating them for such offences.<sup>18</sup>

<sup>16</sup> J. Quinn Thornton to Lane, September 6, 1849, OIA, Roll 2, OHS.

<sup>17</sup> Ibid.

<sup>18</sup> Lane to Secretary of War, October, 1849, OIA, Roll 2, OHS.

It appears that Sub-Agent Thornton was severely criticized by Lane, for he soon resigned. Nevertheless, his policy was successful, for the Indians surrendered six of their number to the military in September.<sup>19</sup> Lane agreed to pay the promised eighty blanket ransom (worth \$480)<sup>20</sup> if the Indians in custody were found to be guilty when tried.<sup>21</sup>

In spite of the tiny American population at Puget Sound, Lane believed that to try the Indian suspects in the presence of their own people would make a strong and beneficial impression on the native mind.<sup>22</sup> For this purpose, the territorial legislature honored his request to authorize a special court session to be held at Fort Steilacoom on the first Monday in October.<sup>23</sup> Judge William P. Bryant, District Attorney A. P. Skinner, and defense lawyer David Stone all travelled a great distance, camped in the woods, and endured considerable fatigue in order to hold the trial. Many of the grand and petit jurors were summoned from a distance of two hundred miles.<sup>24</sup>

19

Ibid.

20

Ibid.

21

Lane to Tolmie, September 24, 1849, OIA, Roll 2, OHS.

22

Lane to Major J. S. Hathaway, September 13, 1849, OIA, Roll 2, OHS.

23

M. Margaret Jean Kelly, The Career of Joseph Lane, Frontier Politician (Washington: Catholic University of America Press, 1942), p. 72.

24Bryant to Lane, October 10, 1849, OIA, Roll 2, OHS.

All six of the Indian suspects were indicted for murder.<sup>25</sup> Two of them, Quallawort, brother of the head chief of the Snoqualmichs, and Kassas, another chief, were found guilty. The other four were acquitted.<sup>26</sup> The findings of the jury accorded with Judge Bryant's own belief that the two men convicted were clearly guilty, while three of the others were guilty to a lesser degree, if at all.<sup>27</sup> The sixth defendant, according to the judge, was probably a slave and put forward by the tribe with the expectation that "the guilty chiefs would be allowed to put [him] in their stead, and that this would be all the satisfaction that would be demanded."<sup>28</sup>

If this was indeed the expectation of Kassas and Quallawort, they and their tribe had much to learn about American law. The two men were hanged the day after their conviction in the presence of many Indians of the Snoqualmich and other tribes.<sup>29</sup> The Oregon Spectator reported that Judge Bryant and others who were present at the trial and execution were well satisfied with the result and convinced that the affair would prove "a salutary lesson to the Indians in that quarter."<sup>30</sup>

25

Ibid.

26

Hubert H. Bancroft, Works, Vol. XXX: History of Oregon, 1848-1888 (San Francisco: The History Co., 1888), p. 80.

27

Bryant to Lane, October 10, 1849, OIA, Roll 2, OHS.

28

Oregon Spectator (Oregon City), October 18, 1849.

29

Bancroft, XXX, 80.

30

Oregon Spectator (Oregon City), October 18, 1849.

For this assurance, the territorial government paid the princely sum of \$1890.54 in lawyer's fees, travel costs, and other expenses, exclusive of the bribe of eighty blankets.<sup>31</sup>

In the following year Governor Lane journeyed to The Dalles to receive from the Cayuse tribe five of its members for trial on charges of committing the murders at Waillatpu. Lane explained that the accused would be tried in the same manner as white men and that their chiefs should be present to witness the operation of the white men's justice. Then he invited the friends of the accused to bid them goodbye as if their conviction was a foregone conclusion.<sup>32</sup>

The prisoners were taken to Oregon City and confined on an island in the Willamette under guard of a detachment of riflemen. A grand jury sat for nine days and returned true bills against the five Indians<sup>33</sup> for the murders of Marcus Whitman, Narcissa Whitman, Luke Saunders, Francis Sager, Andrew Rogers, Jacob Hoffman, and a man named Gillon whose first name was unknown. The wordy indictments were prepared by U.S. District Attorney Amory Holbrook.<sup>34</sup>

<sup>31</sup> Lane to Secretary of War, October, 1849, OIA, Roll 2, OHS.

<sup>32</sup> James E. Hendrickson, Joe Lane of Oregon (New Haven: Yale University Press, 1967), p. 16.

<sup>33</sup> Gates and Johansen, p. 224n.

<sup>34</sup> M. Leona Nichols, "Five Deaths: a Marcus Whitman Sequel," Oregonian (Portland), September 24, 1933. Nichols utilized original trial papers which had recently been discovered in Oregon City.

On Tuesday, May 21, 1850, the Indians were brought into court, where the findings of the grand jury were read in their presence and communicated to them through two interpreters. The court assigned personnel for prosecution and defense in the case of the United States V. Telokite, Tomahas, Isaashe-luckus, Clokamas, and Kiamsumpink.<sup>35</sup>

The trial commenced the following morning and lasted for three days. Judge Orville C. Pratt presided, Amory Holbrook conducted the prosecution, and the defense was undertaken by Knitzing Pritchett, Territorial Secretary, with the aid of Thomas Claiborne and Robert B. Reynolds.<sup>36</sup>

In view of the harsh feelings aroused among Oregonians by the Wailatpu Massacre, a careful effort was made to exclude from the jury all who might be unduly prejudiced against the defendants.<sup>37</sup> One of the jurymen, Anson Coan, recalled years later that it began to appear as if a full jury could not be found. Coan, who had come to the trial as a spectator, whispered to a companion, "come let's go; they will be getting us on the jury!" They slipped outside but were soon found by a deputy sheriff who summoned them to the jury box.<sup>38</sup>

<sup>35</sup> Oregon Spectator (Oregon City), May 30, 1850.

<sup>36</sup> Victor, p. 249.

<sup>37</sup> Ibid., p. 250.

<sup>38</sup> Anson Sterling Coan, "Reminiscences," Oregon Historical Quarterly, IV (September, 1903), 255-256.



Thomas Claiborne led off the spirited attempt by the defense to find some legal avenue of escape for the accused. His efforts failed to impress the territorial marshall, Joe Meek, who recalled,

Captain Claiborne...foamed and ranted like he was acting a play in some theatre. He knew about as much law as one of the Indians he was defending; and his gestures were so powerful that he smashed two tumblers that the Judge ordered to be filled with cold water for him.<sup>39</sup>

Claiborne began with a "plea in bar of jurisdiction" which contended that at the time of the massacre the laws of the United States had not extended over Oregon Territory. The prosecution replied that all territory west of the Mississippi had been declared by an Act of Congress in 1834 to be Indian Territory and subject to the laws regulating intercourse with Indians; in addition, the Act of 1848 creating a territorial government for Oregon gave jurisdiction to U.S. district courts to take cognizance of the offense in question.<sup>40</sup> Judge Pratt gave his own opinion on the matter in which he cited both the Act of 1834 and the boundary treaty of 1846 which confirmed U.S. possession south of the 49th parallel as proof of the court's jurisdiction. To Claiborne's contention that the Act of 1834 was invalid in Oregon, having been made at a time when the territory was still in joint occupancy with Great Britain, Pratt replied that the treaty of

<sup>39</sup> Harvey E. Tobie, "Joseph L. Meek, A Conspicuous Personality," Oregon Historical Quarterly, XLI (March, 1940), 83.

<sup>40</sup> Oregon Spectator (Oregon City), May 30, 1850.

1846 brought into effect ipso facto the provisions of the Act of 1834.<sup>41</sup>

The Indians were asked how they pleaded; they replied, "not guilty", and their counsel petitioned the court for a change of venue to Clark county on the grounds that a fair trial in Clackamas county was impossible. Claiborne noted that citizens of Clackamas county had already made a threat of death against the defendants in case of acquittal. The defense petition was overruled.<sup>42</sup>

A number of witnesses who had been present at Waiilatpu during the massacre were called and examined. Eliza Hall stated she had seen Telokite strike Dr. Whitman, and Elizabeth Sager claimed to have seen Isaasheluckus attack and shoot Luke Saunders. Lorinda Chapman said she had seen four of the defendants armed at the time of the killings, and Josiah Osborne contended that Dr. Whitman had given the same medicines to both whites and Indians and that the Indians knew sick white men died as well as themselves.<sup>43</sup>

The defense endeavored to show that Dr. Whitman had invited his fate by ignoring warnings concerning Indian custom and belief. Dr. John McLoughlin was called, and testified that he warned Whitman in 1841 and 1842 that Indians sometimes

<sup>41</sup>Victor, p. 250.

<sup>42</sup>Nichols, Oregonian (Portland), September 24, 1933.

<sup>43</sup>Oregon Spectator (Oregon City), May 30, 1850.

killed their medicine men. Stickus, a Cayuse chief, stated that he had told Whitman on the day before the massacre to be careful or the bad Indians would kill him. Rev. Henry Spalding recalled that he had been given similar warnings while staying at Stickus' lodge with Dr. Whitman.<sup>44</sup>

The defense offered to introduce further testimony to prove that it was the custom of the Cayuse nation to kill "bad medicine men," but the court refused to admit such testimony,<sup>45</sup> and according to the official trial record,

the court further charged the jury that they might infer that the surrender of the Cayuse nation of the defendants as the murderers of Marcus Whitman, the nation knowing best who those murderers were, now communicating to the court as an official fact, should go to the jury and be received by them as identity of the accused.<sup>46</sup>

On Friday, May 24, the jury returned a verdict of "guilty as charged," after deliberating for 75 minutes. The defense asked for a new trial, contending that the defendants were subject to laws and usages of the Cayuse nation, and outside the jurisdiction of the court. It was further argued that there was no receipt to prove the events given in evidence had occurred in the place alleged in the indictments. These objections were overruled, and Judge Pratt pronounced the sen-

<sup>44</sup> Ibid.

<sup>45</sup> Nichols, Oregonian (Portland), September 24, 1933.

<sup>46</sup> Ibid.

tence of death by hanging on the five defendants.<sup>47</sup>

In his diary entry for May 24, Rev. G.H. Atkinson noted that "the sentence was heard with universal silence and awe."<sup>48</sup> The Oregon Spectator reported that the entire trial, with an attendance of between two and three hundred people, was characterized by the "solemnity and stillness of a church."<sup>49</sup>

Territorial Secretary Knitzing Pritchett's efforts to save the convicted Cayuses did not end with his role as defense counsel. After court had adjourned, Governor Lane departed for the South to conduct some business with the Rogue River Indians,<sup>50</sup> and Pritchett, stating that he was now acting governor, made known his intention of reprieving the condemned men until an appeal could be made to the United States Supreme Court.<sup>51</sup> Joe Meek, who had charge of the prisoners, told Pritchett he would do anything for him as a friend, but as a U.S. Marshal "who always does his duty," he would "execute them men as certain as the day arrives."<sup>52</sup> Pritchett abandoned his plan when Judge Pratt expressed his opinion that a stay of execution by the territorial secretary would be unauthorized

<sup>47</sup>Ibid.

<sup>48</sup>E. Ruth Lockwood (ed.), "Diary of Rev. G.H. Atkinson," Oregon Historical Quarterly, XLI (March, 1940), 26.

<sup>49</sup>Oregon Spectator (Oregon City), May 30, 1850.

<sup>50</sup>Tobie, p. 83.

<sup>51</sup>Victor, p. 251.

<sup>52</sup>Tobie, p. 83.

unless it could be proved that the governor was outside of Oregon.<sup>53</sup>

The execution was scheduled for June 3. Just before their deaths, the five condemned men prepared a declaration of innocence with the aid of the Catholic priests who had taken charge of their spiritual needs. Telokite stated there were ten murderers, two of whom were his sons, and all had since died or been killed. He further claimed he had been tricked into becoming a defendent:

When I left my people, the Young Chief told me to come down and talk to the big White chief, and tell him who it was that did kill Dr. Whitman and others. My heart was big, it is small now. The Priest tells me I must die tomorrow, I know not for what. They tell me that I have made a confession to the Marshal that I struck Dr. Whitman. It is false. I never did such a thing. He was my friend, how could I kill my friend.<sup>54</sup>

The points made by Telokite were echoed by the other condemned men: there had been ten murderers; they themselves were innocent; they had come to give testimony, not to confess guilt; the priests had not put them up to denying their guilt.<sup>55</sup>

On June 3 Oregon City was thronged with people to witness the execution. Joe Meek recalled that Kiamsumpkin "begged me to kill him with a knife- for an Indian fears to be hanged--

<sup>53</sup>Victor, p. 251

<sup>54</sup>"Important declaration made June 2d and 3rd 1850," Marcus Whitman Papers, Mss 1203, OHS.

<sup>55</sup>Ibid.

but I soon put an end to his entreaties by cutting the rope which held the drop." Tomahas took the longest to die, so Meek put his foot on the knot behind his neck to help him along.<sup>56</sup>

The trial, according to the Oregon Spectator, reflected favorably on the people of Oregon Territory. "It is scarcely possible that more intense feeling could possess every bosom than has prevailed in regard to this trial," the newspaper reported, "and yet it all passed off with the most perfect quiet."<sup>57</sup> This, of course, was commendable, as were the efforts to find an impartial jury, but it is also true that the defense was overruled when it tried to demonstrate how the Cayuse nation customarily dealt with "medicine men." Judge Pratt apparently did not consider the possibility of Cayuse custom and belief as an extenuating circumstance in the murders, yet he was more than willing to accept at face value the tribe's contention that the five defendants were the actual murderers. In short, he seemed to have a flexible cultural bias.

It is also interesting to note the distinctions made between the defendants and their alleged victims in the indictments drawn up by Holbrook and presented by the grand jury. The defendants were repeatedly referred to as Indians while the alleged victims were identified in the following manner: "one Marcus Whitman, the said Whitman not then and there being an Indian."<sup>58</sup>

<sup>56</sup>Tobie, p. 84.

<sup>57</sup>Oregon Spectator (Oregon City), May 30, 1850.

<sup>58</sup>Declaration in the murder of Marcus Whitman, May 13, 1850, Marcus Whitman Papers, Mss 1203, OHS.

Telokite is said to have claimed originally that he and his companions surrendered themselves for trial in order to save their people, just as the white missionaries taught that Jesus died to save his people.<sup>59</sup> To the extent that further warfare was averted, the trial was of benefit to the Cayuses, but the tribe had already discovered that land-hungry whites could rationalize the use of more general punishments. In 1848 Henry A. G. Lee, who was serving as Indian superintendent under the provisional government, obtained the approval of Governor Abernethy to publicly proclaim the forfeiture of all lands of the Cayuses because of their misdeeds. No exceptions were made in the case of friendly members of the tribe.<sup>60</sup>

The Oregon Spectator boasted after the trial at Oregon City that the "Cayuse Indian nation has learned a lesson that will never be forgotten by them."<sup>61</sup> Perhaps the lesson provided by Lee's land policy proved to be even more memorable.

59

Victor, p. 249.

60

Carey, p. 557.

61

Oregon Spectator (Oregon City), September 19, 1850.

## CHAPTER V

### JUSTICE UNDER THE EARLY INDIAN SUPERINTENDENTS

Although Governor Lane had a talent for dealing with the red men and for gaining their respect, his brief tenure (March 1849-May 1850)<sup>1</sup> as part-time Indian superintendent brought little in the way of policy or precedent for his successors to follow.<sup>2</sup> Even his forceful argument against the use of bribery for the surrender of Indian defendants was not always adhered to by later superintendents.<sup>3</sup> But Lane did succeed, in one instance, in securing Indian confidence and laying the foundation for future treaty negotiations by dealing with a complaint brought by some Falls Indians. This group had been victimized by an arsonist who sought to drive them from their village near Oregon City by setting fire to their homes and destroying their winter provisions. Lane held a public hearing, decided that the Indians had in fact, been wronged, and allowed them to resettle on their land. Even this mild attempt at reducing an Indian grievance against whites was condemned in some quarters, but the Indians were impressed by what amounted to a novel gesture.<sup>4</sup>

<sup>1</sup>Alban W. Hoopes, Indian Affairs and Their Administration, 1849-1860 (Philadelphia: University of Pennsylvania Press, 1932), p. 72.

<sup>2</sup>C. F. Coan, "Federal Indian Relations," p. 52.

<sup>3</sup>Edward R. Geary to G.H. Abbott, August 20, 1859, OIA Roll 7, OHS.

<sup>4</sup>Hendrickson, p. 13.



When Anson Dart succeeded Lane as Indian superintendent in May of 1850, he was embarking on what proved to be a tragically thankless three year occupancy of that post. Contributing to his burden was the Donation Land Act of September 29, 1850 which authorized grants of 320 acres to male settlers, or 640 acres to married couples, in fee simple upon actual residence of four years. The Pre-Emption Act of 1841 had made provision that land to which Indian title had not been extinguished would be withheld from settlement, but the Donation Act made no such exception.<sup>5</sup> The potential thus created for friction between settlers and Indians was great indeed, and Superintendent Dart referred to the "awkward position" of the Oregonians in a letter to the Commissioner of Indian Affairs in Washington, D.C.:

These facts [regarding the Land Act] are not known to the Indians, nor do they know the fact that the government has never forced the Indians from their land without first having bought them -- Were these...facts well understood by the Indians of this country, the epd of trouble growing out of it could not be foreseen.<sup>6</sup>

The solution was to get down to the overdue business of making treaties which would remove the Oregon Indians from the choice areas of settlement. A commission headed by ex-governor John P. Gaines had already made six treaties with Willamette

<sup>5</sup>Ethel M. Peterson, "Oregon Indians and Indian Policy, 1849-1871" (unpublished master's thesis, University of Oregon, 1934), p. 31.

<sup>6</sup>Anson Dart to Commissioner of Indian Affairs, July 19, 1851, OIA, Roll 3, OHS.

Valley bands and Dart proceeded to negotiate thirteen more with other tribal groups before the end of 1851. Finding the Indians adamant in their refusal to move to the unfamiliar environment east of the Cascades, Dart provided for the reservation of a part of their tribal lands. As this did not remove the Indians from the actual areas of settlement, the treaties proved unsatisfactory to Congress and were not ratified. Dart vainly attempted to explain to the Indians why the Great Father in Washington was not keeping his part of the agreements.<sup>7</sup>

With tension over land possession at a danger point, Dart and his agents were expected to fashion an Indian policy and keep some sort of order with very little help from anyone. The superintendent expressed regret to one of his agents, Elias Wampole, that

the present condition of affairs is such that you will be without power to enforce obedience to the laws there being no troops nor any peace officer of the General Government or the Territory in upper Oregon or within a distance of from 250 to 300 miles.<sup>8</sup>

Problems of order in southern Oregon were multiplied with the discovery of gold there in 1851. By August of that year, Indian Agent Henry H. Spalding could report that "extensive gold mines [were] everywhere being discovered upon its water courses," and these mines were drawing large numbers of the "enterprising citizens, mostly from this Territory, and the

<sup>7</sup> Gates and Johansen, p. 251.

<sup>8</sup> Dart to Elias Wampole, July 21, 1851, OIA, Roll 11, OHS.

State of California."<sup>8</sup>

A substantial number of the "enterprising citizens" drawn to southern Oregon also proved to be rowdy and prone to provoke conflicts with Indians. What could be done about white men who caused trouble for Indians remained an unsettled question. Agent Spalding attempted to remove a man named Long "who had become offensive to the Indians and the Whites" from the Rogue River area, but the Indian department found itself foiled by civil authority. Spalding reported his experience to Dart:

You are aware that the Attorney General gave it as his opinion for some days that there was no law by which to punish a white man for injury done to an Indian. This made it necessary to release Long or rather not to arrest him and with your advice he was permitted to return to that country as a trader.<sup>10</sup>

Sometimes Dart was able to defend the rights of his Indian charges with little more than moral suasion. He appealed to the miners of southern Oregon to demonstrate forbearance and to recognize that "the Indian knows no other law than that of self will, retaliation and revenge."<sup>11</sup> To a Mr. Olney of The Dalles who had been charged by the Indians with taking their women and their horses for his own purposes, Dart merely said, "such treatment cannot be allowed by me," and requested Olney

<sup>9</sup> Henry H. Spalding to Dart, August 25, 1851, OIA, Roll 11, OHS.

<sup>10</sup> Ibid.

<sup>11</sup> Dart to Spalding, March 1, 1851, OIA, Roll 3, OHS.

to settle his differences with the wronged parties.<sup>12</sup> A merchant in Buteville who had confined several Indians on suspicion of theft was admonished by Dart for taking into his own hands matters which should be handled by the courts. The superintendent offered to testify to the good character of the accused.<sup>13</sup>

On July 17, 1851, Chief Justice Thomas Nelson of the territorial supreme court, gave an opinion which was to have far-reaching effects in the Indians' legal position in Oregon. Two men, William Johnson and Ezra Johnson, were brought before Nelson on a charge of assault and battery allegedly committed on a woman of the Clackamas tribe. The prosecution offered as a witness an Indian woman named Hezika. The defendants questioned her competency to testify on the grounds of her race. To this objection, Chief Justice Nelson admitted that the legislature of the provisional government had enacted a law stating that "a negro, mulatto or Indian shall not be a witness in any court or in any case against a white person," and this law was in full force up to the time that Oregon became a territory. The question then arose whether this impediment to Indian testimony continued in force after the passage of the Congressional act to organize the Territory. Chief Justice Nelson decided that it did:

<sup>12</sup> Dart to ----- Olney, March 31, 1851, OIA, Roll 3, OHS.

<sup>13</sup> Dart to F. X. Matthieu, July 22, 1851, OIA, Roll 3, OHS.

By Section 14th of the organic act it is provided that 'the laws now in force in the territory of Oregon under the authority of the provisional government established by the people thereof, shall continue to be valid and operative therein so far as the same be not incompatible with the Constitution of the United States and the principles and provisions of this act.'

Again, the territorial legislature at its last session re-enacted the laws of the provisional government in the very words in which it is quoted above.

It would seem from all this to be very plain that the witness offered is made by law incompetent to testify in this case and she must accordingly be rejected.<sup>14</sup>

Recognizing the far-reaching implications of this decision, Superintendent Dart made a full report of it to the Bureau of Indian Affairs and stated his belief that Congress<sup>15</sup> should enact some law to obviate the problem. But the law remained in force all through the territorial period, and Indians remained at an extreme disadvantage in the courts.

<sup>14</sup>

Dart to Commissioner of Indian Affairs, September, 1851, OIA, Roll 11, OHS.

<sup>15</sup>

Ibid.

## CHAPTER VI

### JOEL PALMER OUTLINES AN INDIAN POLICY

The disappointed Anson Dart resigned from the Indian superintendency in Oregon as a result of his treaties being rejected by Congress and was succeeded by Joel Palmer in May, 1853.<sup>1</sup> In the same year, Washington Territory was formed and Indian administration north of the Columbia and the 46th parallel was transferred to Issac I. Stevens, the governor of the new territory.<sup>2</sup> Even with this geographic reduction, Palmer's department had a load of considerable dimensions in negotiating new treaties and arranging for the removal of Indians from areas of white settlement. Advice on policy from the Bureau of Indian Affairs in Washington D.C. was so sparse that the new superintendent could give his agents only general instructions and deal with each situation as it arose.<sup>3</sup>

Palmer's initial method of approaching the problems of his office was well illustrated when Sub-Indian Agent W.W. Raymond sought advice about an incident in his district in which one Indian had shot another while under the influence of alcohol and then asked protection from the Indian department. Raymond believed the evidence showed the shooting to be justifiable and was willing to grant the protection, but he was un-

<sup>1</sup>Spaid, p. 58.

<sup>2</sup>Josephy, p. 292.

<sup>3</sup>Spaid, p. 92.

certain of his proper course of action. "We have no military force and no jails or places of confinement," he wrote. "I find nothing applicable in any instructions in my possession."<sup>4</sup> Palmer searched his own instructions and advised Raymond that he could find no provision for white interference or punishment in acts of one Indian against another. He then outlined the following policy:

So long as the present imperfect system regulating intercourse between whites and the Indian tribes on this coast exists, it is better that they should be allowed to manage their own affairs, particularly their criminal code in their own way. I would suggest that in the case referred to in your letter, the tribe be allowed to dispose of it according to their own system of justice, so that it be an act of the Tribe and not of an individual; the responsibility will then be thrown upon the Tribe and tend to make them feel its importance.<sup>5</sup>

But the Indian department was not the only organization in Oregon concerned with the internal affairs of the natives, and the proper spheres of influence for the army, the civil authorities and the Hudson's Bay Company were still uncertain. Indian Agent Robert R. Thompson only looked on in disgust when an army officer tried to settle a legal dispute between the Wasco and Dog River Indians in the vicinity of The Dalles,<sup>6</sup> but he expressed himself strongly in regard to the traditional practice of the HBC in consulting with the Nez Perce and Cayuse nations on their choice of chiefs. A. D. Pambrun, an

<sup>4</sup>W. W. Raymond to Palmer, January 4, 1854, OIA, Roll 4, OHS.

<sup>5</sup>Palmer to Raymond, January 22, 1854, OIA, Roll 4, OHS.

<sup>6</sup>Thompson to Palmer, March 18, 1855, OIA, Roll 13, OHS.

official of the company, was warned that the Indian department had deemed it best to let the Indians manage their own political affairs and HBC interference would be looked on with disfavor.<sup>7</sup>

A question also arose in regard to the right of civil authorities to demand Indians for trial. Agent George Ambrose was approached by California authorities in regard to some Indians under his charge who were suspected of committing offenses south of the Oregon border. Ambrose believed his surrender of the suspects would almost certainly mean they would not be heard from again, so he felt it important not to release them to the officials without strong evidence of guilt.<sup>8</sup> Palmer advised him that "the degree of evidence necessary to substantiate the commission of the crime, is to be determined by the civil authorities, and not by officials of the Indian department." While it would be proper for Indian agents to withhold native suspects from a mob of revengeful citizens (Palmer believed volunteer militias sometimes fell into this category), it was necessary to assume that civil authorities of Oregon or California were operating according to law. The Indian department could only use whatever influence it possessed to secure fair hearings for the suspects.<sup>9</sup>

As Palmer went about the business of negotiating a new

<sup>7</sup> Thompson to A.D. Pambrun, October 21, 1853, OIA, Roll 13, OHS.

<sup>8</sup> George H. Ambrose to Palmer, September 8, 1855, OIA, Roll 5, OHS.

<sup>9</sup> Palmer to Ambrose, September 19, 1855, OIA, Roll 5, OHS.



series of Indian treaties more acceptable, both to Congress and to land-hungry settlers, than Anson Dart's had been, conflicts and confusion continued over who had rights to the lands of Oregon. A settler named Robert Hull had occupied a claim on the upper Molalla for some time before he learned he was on an Indian camping ground, but he was not at first disturbed since he thought the Indians would soon be removed to the east side of the Cascades. Time dragged on, however, and the Indians helped themselves to his cabbage and potatoes, excusing themselves with the reminder that Hull had "stolen" their land. At one point, claimed Hull, he was struck by an Indian neighbor whose meat he had refused to purchase. This incident raised the question of how he should handle potentially violent situations, and he put the question to Superintendent Palmer:

I got my gun as quick as possible, thinking to shoot the Indian down; but I did not know if I should be justifiable or not. I want to know whether I shall take the law into my own hands, and shoot them down or not, or shall I wait a little longer expecting to have them removed?<sup>10</sup>

Palmer's reply was not encouraging for Hull's position as a landowner. He stated his opinion that Indians, under current law, still had the right to occupy their traditional villages, camping grounds and fisheries. While it was true that settlers had the right to claim a tract of land, the superintendent could not see that this justified taking a tract of land which

<sup>10</sup> Robert Hull to Palmer, November 17, 1853, OIA, Roll 4, OHS.

was in actual possession of the Indians. He advised Hull against taking the law into his own hands as a fearsome responsibility fraught with peril. Peaceful and persuasive means, Palmer believed, would be most conducive of good results. Should actual danger be anticipated in the period before matters were settled by treaty, the civil law would be "ample to protect the rights of our citizens and punish wrongdoers."<sup>11</sup>

But the civil law was not always ample to protect the rights of either whites or Indians, particularly in southern Oregon where farmers concerned about their land titles were joined by thousands of gold miners to create a volatile atmosphere in which a petty squabble between one Indian and one white man could mushroom into indiscriminate reprisals on both sides. Legal proceedings to deal with such problems were still a rarity and the isolated reprisals sometimes shaded into vigilantism and finally, into outright warfare. The continuing frustration of settlers can be sensed in a letter to Palmer from a man at Winchester who had found Indians trying to kill one of his calves:

I want to know if there is no law to prevent Indians from committing depredations on our property. If there is no law and no way to get recompense for our property we will have to take the remedy into our own hands. Governments are set up to protect the rights of the people, and when it fails, the people have to protect themselves.<sup>12</sup>

<sup>11</sup> Palmer to Hull, December 20, 1853, OIA, Roll 4, OHS.

<sup>12</sup> Daniel Stewart to Palmer, April 9, 1855, OIA, Roll 5, OHS.

During the turbulent years which followed Palmer's appointment to the Oregon Indian superintendency, his office was placed in a difficult position in relation to Indian reprisals. Palmer viewed himself as a protector of Indian rights, and his actions were not always calculated to please the whites. He was accused of softness toward Indian murderers, a charge which he denied by explaining that executions could bring an equal number of deaths among the whites in the form of reprisals. He frankly admitted that if one laid aside prejudice, considerable justification could be seen in Indian acts of retaliation, but "still they must be taught the folly of attempting the redress of their own wrongs, if they would hope to exist."<sup>13</sup>

<sup>13</sup> Palmer to Thompson, July 15, 1856, OIA, Roll 6, OHS.

## CHAPTER VII

### PUBLIC PARANOIA AND THE RULE OF LAW, 1853-1855

In the summer of 1853, the Oregon Statesman reported a disastrous breakdown of Indian-white relations in the Rogue River Valley. Settlers there believed that Indians were bent on their extermination, and indeed, some fifteen or twenty whites had recently been killed or wounded. According to the Statesman, "the people there now demand an extermination of the hostile Indians and are resolved not to stop short of it. Indians are shot down wherever they are found."<sup>1</sup> T. McF. Patton claimed to speak for the majority of citizens in the Rogue Valley when he said:

If we do not make a clean sweep of them and exterminate every one capable of bearing arms, we will be molested every summer until either the white or the 'siwashes' are conquered ... Some say a treaty had better be made! Well I am for a treaty too, but I propose making a treaty with them by means of powder and ball.<sup>2</sup>

In May of 1854 Indian Superintendent Palmer wrote to General John E. Wool, Commander of the Pacific Division, stating in his letter that there wasn't sufficient civil authority in the area around Port Orford even to arrest and jail white men

<sup>1</sup> Oregon Statesman (Salem), August 23, 1853.

<sup>2</sup> Ibid., August 30, 1853.

guilty of crimes against Indians which "would disgrace the most barbarous nations of the world."<sup>3</sup> His request for a small group of soldiers (which Wool granted) was in part motivated by a wish to establish a degree of order in which a few arrests could be made to "provide a wholesome example" and "give confidence to the Indians in government agents."<sup>4</sup>

But the soldiers assigned to Oregon during this period brought yet another volatile ingredient to areas already explosive. The whites saw the soldiers as potential protectors from Indian savagery, while the soldiers themselves sometimes took quite the opposite view of who needed their protection. General Wool, who went so far as to accuse the whites of fomenting warfare in 1854 and 1855 to relieve their depressed economy with army expenditures,<sup>5</sup> earned the enmity of many settlers for his blunt opinions. The Oregonian went so far as to call him "hopelessly deranged, or a most desperate and hardened sinner" for making the following comments in a letter to the National Intelligencer:<sup>6</sup>

It is not a difficult matter, whether dictated by ambition, avarice, or speculation, to get up an Indian war in Oregon. It is only to kill an Indian or two, which almost to a certainty, would cause the death of two white men. Although in the first case there might be no sympathy expressed on the part of the whites, yet in the latter it would be all sufficient, not only

<sup>3</sup> Palmer to General John E. Wool, May 12, 1854, OIA, Roll 5, OHS.

<sup>4</sup> Ibid.

<sup>5</sup> Gates and Johansen, p. 257.

<sup>6</sup> Oregonian (Portland), August 30, 1856.

for a war, but for a war of extermination of the Indians.<sup>7</sup>

General Ethan Allen Hitchcock, Wool's predecessor as Commander of the Pacific Division, confided to his diary how hard it was for his troops to know the whites were in the wrong and still have to punish Indians for defending themselves,<sup>8</sup> and by the end of 1855, Palmer echoed Wool in the belief that "the present difficulty in southern Oregon is wholly to be attributed to the acts of our own people."<sup>9</sup> It sometimes seemed as if the forces of order were arrayed against the whites, and John Beeson, a settler in southern Oregon who was appalled by cruelties toward Indians in his area, perceived a sort of paranoid self-righteousness among Oregonians which made unsafe any word or deed on the red man's behalf. He found newspaper editors very reluctant to publish anything but materials which made Indians appear villainous,<sup>10</sup> and when he, at one point, managed to place his pro-Indian views in print he had to seek military protection from the wrath of his neighbors.<sup>11</sup>

<sup>7</sup> Ibid., reprinted from National Intelligencer (Washington D.C.), no date given.

<sup>8</sup> Robert C. Clark, "Military History of Oregon, 1849-59," Oregon Historical Quarterly, XXXVI (March, 1935), 29.

<sup>9</sup> Palmer to Wool, December 1, 1855, OIA, Roll 5, OHS.

<sup>10</sup> John Beeson, A Plea for The Indians (New York: By the author, 1857), pp. 92-93.

<sup>11</sup> Ibid., pp. 88-89.

Far from acceding to sentiments for Indian extermination, Superintendent Palmer and his agents attempted the more civilized solution of ferreting out the actual troublemakers among the Indians in order to bring them to trial. Palmer cautioned Sub-Agent Samuel Culver that great care should be taken to avoid the "appearance of retaliation and revenge, and to impress on the minds of the Indians that the punishment inflicted is an act of justice for the wrongs they have done."<sup>12</sup> But as troubled times continued, Palmer grew impatient with the "formulas and delays" of civil proceedings. In October, 1855 he noted the difficulty of separating friend from foe among the Indians. In this atmosphere of uncertainty he believed that a chief showing indications of unfriendliness should be arrested on the simple grounds of representing a threat to the peace and security of the settlements.<sup>13</sup>

During 1854, the Indian department resolved to earn the confidence of Oregon Indians by arresting a number of whites charged with offenses against them. Palmer noted that demands of the department for surrender of all Indian offenders unaccompanied by efforts to bring white offenders to trial "may well incline them to distrust our sincerity."<sup>14</sup> The superintendent's instructions to Sub-Agent Martin were as follows:

<sup>12</sup>

Palmer to Samuel H. Culver, August 22, 1853, OIA, Roll 11, OHS.

<sup>13</sup>

Palmer to Major Rains, October 8, 1855, OIA, Roll 5, OHS.

<sup>14</sup>

Palmer to Culver, April 26, 1854, OIA, Roll 11, OHS.

...endeavor to instill into the minds of the settlers a spirit of forbearance in their treatment of the Indians, and upon the Indians that although we have among us persons who sometimes trespass upon their rights, yet our Great Chief the President and the Congress...are governed by principles of justice and desire their good; and as a means of convincing them of this truth...you will at the next term of the District Court held in your county present to the Grand Jury all persons known or believed to have been engaged in violating the peace and laws of the country by [killing Indians] .<sup>15</sup>

Similar instructions were sent to agents Samuel Culver<sup>16</sup> and Ben Wright, and Wright was told that if there was "no tribunal in your county before whom such offenders can be arraigned, send them to Portland by steamer or to this place [Dayton] by land, with such evidence as will be sure to convict them..."<sup>17</sup> The good intentions of the Indian department apparently came to nothing, however, for Palmer remarked that same year that "arrests are evidently useless as no act of a white man against an Indian, however atrocious, can be followed by a conviction."<sup>18</sup>

A persistent irritant was the Indian inability under law to testify in court. Whether in a simple dispute over the ownership of a horse<sup>19</sup> or in a brutal murder case, the word of an Indian witness, however consistent and convincing, counted for nothing. The unfairness of this exclusion was brought out

<sup>15</sup>  
Palmer to William J. Martin, April 10, 1854, OIA, Roll 11, OHS.

<sup>16</sup>  
Palmer to Culver, April 26, 1854, OIA, Roll 11, OHS.

<sup>17</sup>  
Palmer to Ben Wright, October 14, 1854, OIA, Roll 11, OHS.

<sup>18</sup>  
Clark, p. 29.

<sup>19</sup>  
Palmer to John Monroe, February 10, 1854, OIA, Roll 4, OHS.



with special force after several whites attacked an Indian village at the mouth of the Chetko River one morning in 1854, causing the deaths of six Indians and the destruction of forty-two houses.<sup>20</sup> According to the inhabitants of the village, the ringleader in the affair was a man named Miller who had harassed them for some time, abused their women,<sup>21</sup> and even tricked them into selling their rifles,<sup>22</sup> thus leaving them virtually defenseless:

The Indians stated that they had often expostulated with Miller and the only reply they got from him was, if they did not keep quiet, he would drive them off, and that Miller, in consequence of their dissatisfaction and fault finding, sent to Crescent City, and raised a party of desperate Indian killers...The Indians also state that this party staid [sic] some two weeks at Miller's and abused their women...and that one morning about daylight when they were all... asleep in their houses they were attacked by this party, who shot three of their men killing them dead on the spot, then set their houses on fire over their heads and burned three of them alive and wounded others.<sup>23</sup>

Whatever the accuracy of this testimony, recorded by Indian Agent Josiah Parrish, it could not be used against Miller when he was subsequently examined before a justice of the peace. The accused was released on grounds of justification and insufficient testimony.<sup>24</sup> Counsel for the accused made a threat

<sup>20</sup> Josiah Parrish to Palmer, July 20, 1854, OIA, Roll 7, OHS.

<sup>21</sup> Ibid.

<sup>22</sup> Palmer to Commissioner of Indian Affairs, September 11, 1854, OIA, Roll 7, OHS.

<sup>23</sup> Parrish to Palmer, July 20, 1854, OIA, Roll 7, OHS.

<sup>24</sup> Palmer to Commissioner of Indian Affairs, July 11, 1854, OIA, Roll 7, OHS.

against the Indian department for ever having him arrested in the first place.<sup>25</sup>

In the following year occurred one of the rare instances of a white man being convicted for an Indian death. Indian Agent George Ambrose arrested a man named John H. Miller (a different man than described in the previous case), accused of shooting an Indian known as Jim on the Illinois river about sixty miles from Jacksonville.<sup>26</sup> The account which Ambrose got from other Indians who were on the scene indicated that Miller had come to them in a very good humor and gotten into a scuffle with Jim. Jim proved to be the better fighter and threw him down, Miller angrily went to the camp of some packers, got a revolver, and returned to shoot the Indian.<sup>27</sup>

Ambrose thought that although no white man witnessed the shooting, it was necessary for such men as John Miller be dealt with by the law in order to prevent the Indians from "committing some serious depredations." In this particular instance, the Illinois Indians living in the vicinity of the killing were already partially disaffected and likely to go on the warpath at the slightest pretext. Ambrose invited the Illinois chief to accompany him and "witness for himself that we were determined to do justice and would treat white men who killed Indians

<sup>25</sup> Parrish to Palmer, July 20, 1854, OIA, Roll 11, 1854, OHS.

<sup>26</sup> Ambrose to Palmer, May 4, 1855, OIA, Roll 5, OHS.

<sup>27</sup> Ibid.

as we did Indians who had killed white men."<sup>28</sup>

The case came before Judge Matthew Deady at the Jackson County district court in May, 1855. Indictment against John H. Miller was "for assault with intent to kill Indian Jim." A witness testified that the accused had given as his reason for shooting Jim,

in crossing the plains the Indians had killed his uncle and wounded his father and that when he left home he had promised his father that if ever an Indian crossed his path he would kill him or hurt him. I incline to think he said hurt him.<sup>29</sup>

It is interesting that Judge Deady felt called upon to remind the jury that the murdered Indian had, in fact, been a human being:

Counsel for the defence have argued this case upon the hypothesis that killing an Indian is no murder. Or at least that the circumstance that the assault with which the accused stands charged was made upon a person of that race should in some way go far to palliate if not absolutely excuse the offence. ... By the laws of this Territory it is made a criminal offence for 'any person armed with a dangerous weapon to assault another with intent to murder,' that is to assault another person. An Indian without reference to the position he occupies in the intellectual or moral scale of humanity is within the meaning of the Statute 'a person' - a human being. Although the loss to society resulting from the death of an Indian may be comparatively small, yet the guilt of the slayer, or one who attempts to slay is none the less complete, whatever may be the color of the victim ... You have taken an

<sup>28</sup> Ibid.

<sup>29</sup> Oregon Statesman (Salem), June 2, 1855.

oath to decide upon the guilt or innocence of the accused according to the evidence and not according to the prejudices and feelings which may or may not exist in the minds of the community with reference to the particular caste or color of the person assaulted.<sup>30</sup>

The jury returned a verdict of guilty and Miller was sentenced to two years in prison for manslaughter.<sup>31</sup> For the jury-men, the conviction may have seemed a responsible and noble act, but the Illinois Indians felt otherwise. To their minds, the murder of Jim had been unprovoked and coldblooded and they could not reconcile their own ideas of justice with the light sentence given to Miller. Difficulties with the tribe continued, and the opinion persisted among them that the white men had one law for themselves and another for the Indians.<sup>32</sup>

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ambrose to Palmer, June 30, 1855, OIA, Roll 7, OHS.

## CHAPTER VIII

### VIGILANTES AND INDIAN DEFENDENTS IN THE PALMER ERA

The growing Indian conviction that something was very wrong with the white man's legal procedures was further confirmed by some notable vigilante tactics which clashed with the best efforts of the Indian department, the army, and the civil authorities to grant Indian offenders due process of law. In August of 1855, James Buford, a man in the Port Orford district who had occasionally assisted Indian Agent Ben Wright, received a flesh wound in the shoulder from a shot fired by an Indian. Buford was so incensed that he immediately gathered a group of friends and set out on a hunting expedition to shoot down his assailant. But Wright came upon their intended victim first, and the Buford party reluctantly agreed to abide by the law.

For some reason, however, a mob psychology took hold of the miners in the area, sixty of whom set out to inflict their own brand of punishment on the captured savage. Wright called for protection from a group of soldiers, who proceeded to escort the prisoner under guard down a river to be surrendered to civil authorities for trial. Before reaching their destination, the two military canoes were approached by a third canoe, carrying three men who proceeded to shoot down both the prisoner and another Indian employed by the soldiers. The soldiers turned and fired on the assailants, killing two and mortally

wounding the third, who was later found dead. One of the assailants proved to be James Buford.<sup>1</sup>

In relating these events in an Oregon Weekly Times article, Superintendent Palmer stated that the Indian prisoner "was regarded as a worthless fellow ... and the act of wounding Buford was regarded, even by the Indians, as a good reason for putting him to death."<sup>2</sup> Nevertheless, Ben Wright regretted that the "salutary influence" to be gained from punishment according to law was lost by the actions of the hot-headed whites, especially at a time when a number of Indians had been assembled in the district to negotiate a treaty. Excitement was intense in this gathering, but the killing of the three white men proved satisfactory evidence that "those desiring their presence in counsel had no hostile intent."<sup>3</sup>

The actions of Buford and his friends were clear examples of vigilantism, but in the disorganized and uncertain atmosphere of Oregon Territory it was not always easy to distinguish between legal and illegal justice. Indian Agent Nathan Olney took into custody an Indian who was pointed out to him as one of the murderers of two white men. The suspect's own people, according to Olney, acknowledged his guilt and desired that he be given a trial since he was a troublemaker who might hamper

<sup>1</sup>Palmer, in Oregon Weekly Times (Portland), September 29, 1855.

<sup>2</sup>Ibid.

<sup>3</sup>Ibid.

their friendly relations with the whites. For this reason, as Olney later reported to Palmer, in his role as Indian agent he requested the citizens of Port Orford to elect a judge, impanel a jury, and conduct a "fair and impartial trial." The defendant confessed his guilt and implicated another member of his tribe in the murder of which he was accused. He was found guilty and hanged.<sup>4</sup>

Superintendent Palmer's interpretation of the proceedings in Port Orford was quite different from that of Olney. Palmer reported to the Bureau of Indian Affairs that Olney had turned the Indian suspect over to a mass meeting which had unlawfully tried and convicted him:

It is proper...to state that the Indian is alleged to have confessed his guilt...and very likely deserved death, but that could give no justification, for the act of the agent in turning him over and aiding a mob in thus unlawfully condemning and executing him.<sup>5</sup>

In another instance, a group of miners at the mouth of the Rogue River decided to strike a middle path between individual "justice" and legally constituted authority. They formed their own "court" to try a You-yua-chee Indian who had been involved in trifling dispute with three men named Culver, Quailey, and McClure two months earlier.<sup>6</sup>

<sup>4</sup> Nathan Olney to Palmer, May 6, 1856, OIA, Roll 14, OHS.

<sup>5</sup> Palmer to Commissioner of Indian Affairs, July 3, 1856, OIA, Roll 6, OHS.

<sup>6</sup> F. M. Smith to Palmer, March 31, 1854, OIA, Roll 13, OHS.

The dispute had long since come to the attention of Sub-Indian Agent F. M. Smith who had received testimony from the white men concerned as well as Indian witnesses. On or about January 19, 1854, the three men had landed on a beach used by the You-yua-chee tribe and the accused Indian, along with others of the tribe, had assisted in unloading the boat. A quarrel arose between Quailey and the Indian, and Quailey struck the Indian on the head with a club. The Indian jumped back, drew up his gun, and assumed an attitude of defense. Culver drew his revolver, charged the Indian, and actually fired in his direction. This was the extent of the incident and Sub-Agent Smith received an admission from Culver and McClure that they were as much to blame as the Indian. Smith concluded from the evidence that the white men were entirely to blame. The Indian was dismissed, and the matter supposedly settled.<sup>7</sup>

On March 20 a politician named William Tichenor was on a campaign visit to the miners at the mouth of the Rogue River. The You-yua-chee Indian and Culver both happened to be present, and Tichenor, apparently seeing a chance to use anti-Indian sentiments among the miners to advance himself, reminded Culver of the earlier dispute and urged the necessity of bringing the Indian to trial before the miners. Tichenor assumed the title of "Counsel for The People" and the judgement of the court against the defendant was "guilty of an attempt to take a white

<sup>7</sup> Ibid.



man's life." The sentence was death.

Such an extra-legal course apparently bothered a portion of the miners, for the decision was altered to the extent that a committee of twelve was chosen to take the "convicted" man to Port Orford and to demand his trial and execution at the hands of Sub-Agent Smith. The committee was further instructed to return with the Indian to the mouth of the Rogue River if Smith refused to hang him.

Smith took the Indian into custody, but with the real object of protecting him from the miners. When Tichenor and his party learned they had been tricked, they were furious and initially vowed to take the man back by force. In time, however, their tempers cooled and they decided not to act so rashly.<sup>8</sup>

During the same month in which Sub-Agent Smith had to deal with the above events, he was faced with even more serious difficulties from another quarter. He had submitted a report of a massacre of Indians in which he apportioned a considerable amount of blame to certain white men. This report appeared in a California newspaper and infuriated those connected with the event:

They boldly declared...that they would send down a committee of forty to arrest and take me to the Coquille to be tried before and by the miners and offered to bet one hundred dollars that in less than five days they would have me there -- My position is disagreeable to say the least. There is but one man in the Garrison at Port Orford, and I am surrounded and my life threatened.<sup>9</sup>

<sup>8</sup> Ibid.

<sup>9</sup> Smith to Palmer, March 1, 1854, OIA, Roll 4, OHS.

Smith, shortly thereafter, submitted his resignation to Superintendent Palmer, who expressed his regret that public sentiment "was so influenced and operated upon, as to induce a person engaged in the public service to abandon his post for fear of violence."<sup>10</sup>

It is probable that only the most colorful and troublesome examples of vigilantism were included in the reports of Indian agents during the territorial period. Occasions in which whites and Indians used extra-legal justice to settle disputes to their mutual satisfaction were less dramatic and less likely to come to the attention of the Indian department. Consequently, it is not possible to determine from the Oregon Indian Affairs records how often this alternative to bloody reprisals or warfare was employed. One rare account concerns some Indians who were induced by two white men to rob a camp of Chinese in a mining district and succeeded thereby in obtaining revolvers. The firearms alarmed some of the miners in the area who decided the Indians intended to cause trouble. The misunderstanding threatened to lead to open hostilities, but was compromised when the Indian thieves were whipped by their chief and the two whites who had induced them to steal were driven away by the miners.<sup>11</sup>

<sup>10</sup>

Palmer to Smith, March 29, 1854, OIA, Roll 4, OHS.

<sup>11</sup>

Ambrose to Palmer, April 14, 1855, OIA, Roll 5, OHS.

## CHAPTER IX

### INDIAN REMOVAL AND LAW BY TREATY, 1856-1858

In the atmosphere of confusion, anarchy and warfare which characterized Oregon Indian relations of the mid- 1850's, Joel Palmer was busily arranging treaty councils with a number of tribes and setting the stage for reservation life. A beginning was made in September, 1853, with the Treaty of Table Rock which Palmer and Joseph Lane negotiated with the Rogue River tribe and the Cow Creek band of Umpquas.<sup>1</sup> The Indian agent was recognized by the provisions of this treaty as official referee in legal disputes between Indians and settlers. The chiefs promised to deliver up for punishment members of their tribes against whom complaints of injury were made to the agent, and the government, in turn, promised to try whites who committed crimes against Indians.<sup>2</sup>

In the following two years, the Oregon Indian department, working alone or in cooperation with Governor Stevens of Washington Territory, negotiated a series of treaties with many of the tribes of the Pacific Northwest.<sup>3</sup> One such agreement,

<sup>1</sup> Gates and Johansen, p. 252.

<sup>2</sup> Charles J. Kappler (ed.), Indian Affairs, Laws and Treaties, (2 Vols., Washington: Government Printing Office, 1903, II, 448-450.

<sup>3</sup> Gates and Johansen, p. 254.

made in November, 1854 with the Shastas, Skotons, and a portion of the Umpquas, contained a clause relating to criminal justice which was repeated almost word-for-word in all of Palmer's later treaties. The Indians agreed to abandon both private retaliation and warfare: differences within a tribe or between tribes were to be submitted to Indian agents for arbitration. If it was proved that an Indian had stolen a white man's property, the property would be returned or paid for out of the tribe's government annuities. Injured or destroyed property would also be paid for out of annuities.<sup>4</sup> Later treaties with other Indians modified the prohibition on intertribal warfare so that retaliation in self-defense was allowable, and the rules for depredations were extended to apply to complaints between Indians. A clause was also added by which Indians agreed to "submit to, and observe all laws, rules, and regulations which may be prescribed by the United States for their government."<sup>5</sup>

As we have seen in previous chapters, the era of treaty-making was also an era of serious Indian-white conflicts, and Joel Palmer often adopted the Indians' point-of-view in these conflicts. This, of course, was not helpful to his public popularity or political standing. Many people were additionally angered when General Wool published a portion of the

<sup>4</sup> Kappler, II, 491.

<sup>5</sup> Ibid., 493-494

Wool-Palmer correspondence which contained the superintendent's statement that his own race was wholly responsible for Indian conflicts in southern Oregon.<sup>6</sup> In his study of Palmer's career as Indian superintendent, Stanley Sheldon Spaid contends that such a statement, unaccompanied by others made to subordinates and to the Commissioner of Indian Affairs, had the effect of making Palmer seem to condemn the settlers en masse when he actually blamed only a few for Indian difficulties. At any rate, a movement for his dismissal gained in strength<sup>7</sup> and on August 16, 1856 Absalom F. Hedges became the Superintendent of Indian Affairs for Oregon.<sup>8</sup>

Hedges held his office only briefly, being succeeded in May, 1857 by James W. Nesmith, the last Oregon superintendent of the territorial period.<sup>9</sup> The year of Nesmith's accession was marked by occasional friction between settlers and those Indians who had yet to be removed to the new reservations. Residents of the mouth of the Rogue River were unable to travel to Crescent City in safety because of Indians who remained nearby,<sup>10</sup> and settlers in the Umpqua Valley were bothered by "hostile Indians ... yet prowling about in that section of the

<sup>6</sup> Spaid, p. 239.

<sup>7</sup> Ibid., p. 240.

<sup>8</sup> Peterson, p. 80.

<sup>9</sup> Ibid.

<sup>10</sup> Petition from "residents at or near mouth of Rogue River" to Absalom F. Hedges, January 29, 1857, OIA, Roll 15, OHS.

country, destroying property and jeopardizing the lives of its citizens."<sup>11</sup> The Board of Commissioners of Clatsop County complained that "Roving Indians" made frequent visits and were poor guests:

In one instance which recently transpired an Indian after making a disturbance cut the head off from an Indian woman. The county in his case incurred the expense of Ten Dollars Sheriff's services. In another case an Indian committed assault on an unoffending old Negro living here. The Sheriff's fees in this case was [sic] Five Dollars and twenty cents.<sup>12</sup>

By the following year most Oregon Indians were on the reservations and opportunities for friction with the settlers were minimized. The Oregon Statesman reported in the summer of 1858 that some reservation Indians had already shown an interest in agriculture and were cultivating a few acres assigned to them for their family needs, but many were still restless in their new homes.<sup>13</sup>

For those who curbed their restlessness and remained on the reservations, criminal justice was now largely a matter between themselves and the United States government. The "justice" of indiscriminate reprisals, volunteer militias, miners committees, and "citizen's courts" receded with Indian removal from areas of settlement.

<sup>11</sup>C. S. Drew to Hedges, February 18, 1857, OIA, Roll 15, OHS.

<sup>12</sup>James Wayne to Hedges, April 9, 1857, OIA, Roll 15, OHS.

<sup>13</sup>Oregon Statesman (Salem), September 21, 1858.

## CHAPTER X

### THE CASE OF THE MODEL INDIAN: DICK JOHNSON AND WHITE JUSTICE

On the evening of November 28, 1858, two successful and respected residents of the Umpqua Valley, near Yoncalla, were shot down, unarmed and unresisting, in the doorway of their cabin. The wives of the murdered men fled to a nearby farm where they reported that a party of eight men, several of whom they knew by name, had committed the crime.<sup>1</sup> The news spread quickly through the community, raising cries of outrage and some demands for lynching the killers; but a leading citizen counseled obedience to the law,<sup>2</sup> and legal proceedings were initiated against the eight men.<sup>3</sup> These events sound much like a script for a western drama unless an additional fact is taken into account: the two murdered men were Indians.

Dick Johnson and his stepfather, known as Mummy, lived lives which personified the highest hopes then held for the red race by sympathetic white men. The Johnson family, with virtually no agricultural background, took a piece of land, and through hard work and conscientious imitation of their white neighbors' methods, turned it into a prosperous farm.

<sup>1</sup> Jesse Applegate to James Nesmith, December 28, 1858, Nesmith Papers, Mss 577, OHS.

<sup>2</sup> Sally Applegate Long to A. W. Ackerman, March 2, 1902, Applegate Family Papers, Mss 233, OHS.

<sup>3</sup> Oregon Statesman (Salem), December 21, 1858.

Dick, the family's leader and spokesman, had a reputation for honesty, intelligence, and shrewdness in business matters.<sup>4</sup>

His highest ambition was to see his two children educated and living like white people.<sup>5</sup> The women of the family, consisting of Johnson's wife, his mother, known as "Old Lemyei," and his sister, Eliza, wore the same fashions as their white neighbors and were enthusiastic churchgoers.<sup>6</sup>

The progress of the Johnson family through the decade of the 1850's was striking evidence that at least a portion of the troublesome red race could fill the role written for them by the "better class" of whites who hoped to save them from destruction. In the light of Dick Johnson's conspicuous industry, antagonism toward Indians in general diminished in the vicinity of Yoncalla.<sup>7</sup> People instead behaved as if they were in the presence of a noble experiment which merited their encouragement. They gave the Johnson family plants, seeds, and shrubs and hastened to their defense in times of trouble.<sup>8</sup> The

<sup>4</sup> Stephen F. Chadwick to Nesmith, December 28, 1858, Nesmith Papers, Mss 577, OHS. Dick was apparently the only member of the family to employ a surname, but collective references in this chapter to the "Johnson family" are meant to include his wife, mother, stepfather, sister and brother-in-law as well.

<sup>5</sup> Edwin P. Drew to Nesmith, February 17, 1859, OIA, Roll 17, OHS.

<sup>6</sup> Long to Ackerman, January 13, 1902, Applegate Family Papers, Mss 233, OHS.

<sup>7</sup> Oregon Argus (Salem), January 8, 1859.

<sup>8</sup> Long to Ackerman, January 13, 1902, Applegate Family Papers, Mss 233, OHS.



The Indians gained important allies in Jesse Applegate, Joel Palmer and J. W. Perit Huntington, all of whom had influence and political connections and saw Dick Johnson as a model to be held up to other Indians for emulation.

The Johnson family left their tribe, the Wandering Klickitats, at about the time that settlement commenced in the Umpqua Valley in 1849. Dick worked for some of the earliest settlers and quickly impressed them with his character and his desire to be a "Boston."<sup>9</sup> When he told his white friends how much he would like to have land of his own for cultivation, they advised him to choose some obscure location which would not be likely to invite someone's greed in future years. Johnson carefully heeded this advice and settled with his family in a narrow strip of land in a ravine.<sup>10</sup>

The Indian's progress as a cultivator was so rapid as to invite expressions of surprise and admiration from neighbors who had been familiar with farming methods all their lives.<sup>11</sup> By 1854, three years after beginning his independent efforts in the ravine, he had twelve acres enclosed and in a good state of cultivation. He had also built a workhouse and accumulated a set of farming tools. By this time, however, his efforts had already invited the greed which the Indian's friends had feared. In late 1852 or early 1853, a settler named Bean took a claim which included more than half of the Johnson enclosure. A con-

<sup>9</sup> Oregon Argus (Salem), January 8, 1859.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

flict arose between the two men which resulted in Dick's receiving a severe beating at the hands of Bean. Then, in June of 1854, another man named Henry Canaday took a claim adjoining Bean which took in Johnson's house, spring, the remaining part of his field, and a piece of ground which he had laid out for pasture. Dick appealed to his white friends for assistance and a number of them visited Canaday in an effort to effect a compromise or get Canaday to leave, but the newcomer stubbornly refused any arrangements, saying that the "law" would give him the place, and that he intended to "have it anyhow."

Johnson next applied to Sub-Indian Agent William J. Martin for help. Martin conferred with both Canaday and Bean and advised them to hold their ground. He told Johnson to occupy only the area he had actually enclosed. This arrangement was apparently an effort to force the Indians out, since it cut them off from their spring, pasturage, and firewood.<sup>12</sup>

Friends of the Johnson family, finding Henry Canaday incorrigible and Martin of no help, decided on more persuasive methods. On July 17 a party of forty men gathered at the Johnson cabin for the purpose of moving Canaday but after six hours discussion, decided they were probably acting outside of the law and resolved, instead, to petition President Pierce for the firing of Sub-Agent Martin.<sup>13</sup>

<sup>12</sup> J.W. Perit Huntington to Palmer, July 9, 1854, OIA, Roll 4, OHS.

<sup>13</sup> William J. Martin to Palmer, July 19, 1854, OIA, Roll 13, OHS.

Indian Superintendent Joel Palmer was meanwhile giving thoughtful consideration to the legal aspects of the case. In the Congressional Act of August 14, 1848, organizing Oregon Territory he noted a clause stating "that nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such right shall remain unextinguished by treaty between the United States and such Indians." Palmer concluded that while Indian rights were usually interpreted as "hunting, fishing, etc.," that

principles of justice and humanity would give it a broader interpretation, particularly in a case such as Dick Johnson in which he had taken the unusual step of cultivating a piece of land, thus providing an example for his fellow Indians to turn from their old savage mode of life.<sup>14</sup>

Palmer believed that although an act making land donations to settlers had been passed subsequent to the Act of 1848, that the Johnsons were still within their rights, since the government "could not have contemplated in the enactment of this law, the right to dispossess the Indians of the spots of ground upon which their dwellings were situated."<sup>15</sup>

Palmer instructed Martin to once again visit Johnson, Canaday, and Bean and try to work out a compromise. He met with intransigence from all three parties, but finally succeed-

<sup>14</sup> Palmer to Martin, July 29, 1854, OIA, Roll 4, OHS.

<sup>15</sup> Ibid.

ed in marking out a 120 acre plot for Dick Johnson's family which Canaday and Bean pledged to respect for the time being.<sup>16</sup>

This settlement of the conflict was shortlived, for later in the same year a treaty was made with the Umpqua tribe which placed the land rights of the Indian family in a shakier position. Although Dick Johnson was a Klickitat, his wife was an Umpqua and he and his family were included in the treaty negotiations with that tribe and asked to move to a reservation being set up for them,<sup>17</sup> Palmer was particularly anxious for Johnson to settle among other Indians as an example of how they might benefit by adopting the agricultural mode of life. But the family preferred to remain on the land to which they had devoted so much labor.<sup>18</sup>

Palmer decided to honor these wishes, but since it could now be said that the Johnsons' land rights in the Umpqua region had been extinguished by treaty, a new way had to be found to secure their possession of the farm. Palmer decided to ask Congress to grant them the land and promised Dick that should the Congressional decision be adverse, then he would be paid for his labor and either sent to a reservation or allowed to use his payment to buy another farm. Johnson would be given a letter, signed by Palmer, to insure his peaceable

<sup>16</sup> Martin to Palmer, August 12, 1854, OIA, Roll 13, OHS.

<sup>17</sup> Nesmith to Commissioner of Indian Affairs, January 12, 1859, OIA, Roll 7, OHS.

<sup>18</sup> Applegate to Nesmith, September 26, 1858, Nesmith Papers, Mss 577, OHS.

possession until Congress acted in the matter.<sup>19</sup>

At the time of Johnson's murder four years later he still had on his person a letter of possession signed by Joel Palmer.<sup>20</sup> In all that time, the Indian believed and acted as if his rights to his property were unquestionable,<sup>21</sup> but, in fact, his letter only expressed the hope that people "who would be regarded as good citizens will refrain from disturbing said Indian in his possession of said claim."<sup>22</sup> What, if anything, Palmer did in the matter of securing Congressional action was still a mystery to Jesse Applegate several years later when he wrote to the Indian department on Johnson's behalf.<sup>23</sup>

Canaday was undoubtedly aware of Dick Johnson's tenuous legal position, and he was still determined to have the Johnson lands with their considerable improvements. He and his small group of supporters could see that anything lacking in the legal status of the Johnson claim was offset by the tremendous goodwill which the family commanded in the Umpqua Valley community. If something could be done to make the Johnsons look

<sup>19</sup> Ibid.

<sup>20</sup> Drew to Nesmith, February 17, 1859, OIA, Roll 17, OHS.

<sup>21</sup> Oregon Statesman (Salem), December 21, 1858.

<sup>22</sup> Palmer to "All whom it may concern," December 4, 1854, Palmer Papers, Mss 114, OHS.

<sup>23</sup> Applegate to Nesmith, September 18, 1858, Nesmith Papers, Mss 577, OHS.

bad, Canaday believed he might triumph. A crude effort was launched by Canaday and his sympathizers to get the Indians to react violently to harrassment and thus alienate the community. Their fences were broken and their stock killed. Dick and Mummy were beaten.<sup>24</sup> But the Canaday scheme was recognized by some of the Johnsons' friends who counseled them not to strike back under any circumstances.<sup>25</sup>

Canaday included more serious tactics. A murder occurred and Canaday pointed to Dick Johnson as the culprit. According to Jesse Applegate, it was a murder which the Indian could not possibly have committed, and apparently no charges were ever brought against him.<sup>26</sup> Canaday did, however, succeed in bringing Dick to trial on charges of arson, but the trial resulted in acquittal.<sup>27</sup> Finally, in the Fall of 1858, James Smith, Canaday's son-in-law, moved into the area and proclaimed that he had legally preempted the Johnson land. Whether he had actually done so was unknown, but a group of the Indian's friends still volunteered to pay Smith full value for the land if he would agree to settle elsewhere. Smith refused; a readymade farm was a prospect too tempting to be

<sup>24</sup> Ibid.

<sup>25</sup> Ibid., December 3, 1858.

<sup>26</sup> Ibid., September 18, 1858.

<sup>27</sup> Oregon Statesman (Salem), December 14, 1858.

28  
easily abandoned.

Jesse Applegate asked the help of his old friend James Nesmith who was now Superintendent of Indian Affairs in Oregon. Applegate outlined the long series of conflicts between the Johnson family and the Canadays and asked that some effort be made by the Indian department to give the Johnsons firm legal claim to their land. If this could not be done, then Applegate believed that they should at least receive a payment for their extensive improvements to the land in view of the fact that they had not earlier benefited in the treaty made with the Umpqua tribe.<sup>29</sup>

Nesmith replied that it was not in his power to afford the Johnsons any relief. He pointed out that the Johnson land was in an area where Indian title had been extinguished by treaty and "by act of Congress is subject to be held by preemption by any American citizen. Any order or effort on my part to forbid its being so held would be...absurd." Nesmith further stated that he believed Palmer had erred in ever giving them the idea they could acquire title to the land. While it was true, as Palmer had indicated, that it was possible for Congress to make a donation of the claim to the Indians, such a solution was fraught with delays, and it

<sup>28</sup> Ibid., December 21, 1858.

<sup>29</sup> Applegate to Nesmith, September 18, 1858, Nesmith Papers, Mss 577, OHS.

was a question "whether or not individuals have not already acquired rights to the soil which would render any such effort useless." Nesmith's advice to the Johnsons was to get what they could for the value of their improvements and move to the Grand Ronde Reservation where the superintendent would see that they got a piece of land and were protected in their rights.<sup>30</sup>

Applegate apparently agreeing with Nesmith that it might be best for the family to remove to Grand Ronde, reminded the superintendent of Palmer's promise to pay Dick Johnson for his improvements to the land. If Palmer had continued as Indian superintendent, Applegate believed, he would surely have carried out his promise, and if "he had erred in so doing you must admit it would have been on the side of humanity and justice."<sup>31</sup>

But Nesmith was not admitting any such thing. Reading the duties of his office quite literally, he maintained that no such special favors for individual Indians were possible under the Umpqua treaty of 1854. While expressing strong sympathy as a private citizen for Dick Johnson's plight, the superintendent strongly implied that the Indian's troubles were largely of his own making, since he had chosen to forfeit the reservation protection offered to his tribe at the

<sup>30</sup> Nesmith to Applegate, September 22, 1858, OIA, Roll 7, OHS.

<sup>31</sup> Applegate to Nesmith, September 26, 1858, Nesmith Papers, Mss 577, OHS.



time of the treaty.<sup>32</sup>

All of this angered Applegate, who sarcastically replied that Nesmith's expression of sympathy as an individual spoke well for his private heart, but Johnson had not known that "public officers have more than one character to sustain." With Nesmith refusing to remunerate the Indian family for their extensive improvements to the disputed land, they declared their intention to remain. Nesmith, in turn, declined to force them off, and the situation reached a crucial deadlock.<sup>33</sup> The Canaday-Smith faction had had enough and decided upon a final solution.

The events of November 28, 1858 were described consistently and in detail by the Indian witnesses to the murders of Dick Johnson and Mummy. Their testimony was reported by Jesse Applegate in a letter to the Indian department, from which the following account is taken.

At sundown, Dick was cutting firewood in front of his cabin while Mummy was standing in the door. Eight men, most of whom were armed with rifles, approached near another cabin where Mummy lived with Dick's mother, Old Lemyei, and Dick's sister and brother-in-law, Eliza and Jim. Three of the men were seen to conceal themselves near Mummy's cabin and the remaining five proceeded to Dick's. Of these five, two were

<sup>32</sup>

Nesmith to Applegate, October 6, 1858, OIA, Roll 17, OHS.

<sup>33</sup>

Applegate to Nesmith, October 19, 1858, Nesmith Papers, Mss 577, OHS.

well-known to Johnson's wife, who was watching the events from inside the building. One of these known individuals pointed to one of the strangers and referred to him as "Nesmith" came to take them to the Indian reserve, and said that Dick must deliver up his arms instantly or be shot. Johnson replied that he knew the man was not Nesmith and if they wanted to shoot him he would not resist. He was then shot through the chest, and Mummy was shot in the chest, abdomen, and back. The man impersonating Nesmith rushed upon Johnson's wife and prostrated her with a blow to the temple from his pistol.

At this point, the old man leading the group(identified by the witnesses as Henry Canaday) spotted Dick's brother-in-law, Jim, approaching on horseback and placed his forces in ambush. Someone called out to Jim that Nesmith had come and wanted to talk to him, but in Jim's words, he did not believe "that Nesmith would come in the night, or shoot so much when he did come." He spurred his horse toward Mummy's cabin which was still under the surveillance of the three men left there by Canaday. The Indian spotted his prospective killers just in time, for he threw himself off and behind his horse in such a way that the horse received all three balls fired by the men. At this point the other party of five ran toward Jim, but he was able to escape into the cabin (where his wife and child were hidden) with only a flesh wound. The pursuers, knowing he had access to a rifle inside the cabin, hastily retreated.

Old Lemyei and Mrs. Johnson saw that their husbands were both dead. They took Dick's two children and went under cover of dark to the home of a neighbor to report the murders. The two women at that time believed Jim and his wife also had been killed.<sup>34</sup>

When news of the tragedy reached the surrounding community the people were in an uproar. There was little doubt of the guilty men's identities in light of past events and the detailed information provided by Johnson's wife, his mother, and his brother-in-law. Jesse Applegate had to use his influence to cool the tempers of some who wanted to lynch Canaday and the others.<sup>35</sup>

An inquest began immediately. It was concluded that Dick Johnson and Mummy had literally heeded the advice of their friends to remain nonviolent under any provocation: Johnson's axe was still resting in its notch; Mummy's sheath knife was found on his body still in its scabbard; the only serviceable rifle in Dick's cabin was not even loaded. All of the other evidence brought out fit perfectly with the stories of the three Indian witnesses. In one dramatic instance, Old Lemyei placed a finger on the bullet hole in Mummy's back, then pointed it at a Mr. Allen and said, "your son did this." According to Jesse Applegate, "the old man shook like a per-

<sup>34</sup> Ibid., December 3, 1858.

<sup>35</sup> Long to Ackerman, March 2, 1902, Applegate Family Papers, Mss 233, OHS.

son with ague."<sup>36</sup>

John Allen was indeed among the eight men subsequently bound over by an examining magistrate to appear at district court on a charge of murder.<sup>37</sup> The others were Henry Canaday, two of his sons, Joshua and John, James Smith, and three strangers to the community named Frank Little, John Timmons, and Cornelius Frane.<sup>38</sup> The latter group, known as "the three Californians"<sup>39</sup> were reputed to be suitors to Henry Canaday's two daughters and one stepdaughter, and may have participated in the murders to gain his approval.<sup>40</sup>

When the examining magistrate subpoenaed the women of the Canaday family, they did not appear, and it was later discussed that three of them had gone to Winchester with Timmons and Frane under cover of dark, registered at a hotel, and had not emerged until four days later, again under cover of dark.<sup>41</sup> Before the end of the same month, two members of the Canaday family were suddenly married to Timmons and Frane,<sup>42</sup> raising the question of how much their plans were affected by the

<sup>36</sup> Ibid., January 13, 1902.

<sup>37</sup> Oregon Statesman (Salem), December 21, 1858.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Applegate to Nesmith, December 26, 1858, Nesmith Papers, Mss 577, OHS.

<sup>41</sup> Chadwick to Applegate, December 7, 1858, Applegate Family Papers, Mss 233, OHS.

<sup>42</sup> Oregon Statesman (Salem), January 4, 1859.

inadmissability of a wife's testimony against her husband in the anticipated court proceedings.

Meanwhile, Jesse Applegate had been analyzing the unprecedented concern in his community for justice in a case involving Indians. He concluded that the motives of some men involved more than love for Dick Johnson and Mummy:

The prudent among us seem to fear that the thing may be made public and a true statement of it reach Washington before Congress acts upon our war debt. There are many persons, in the United States, who hold the doctrine that the 'inferior races' are human and entitled to live if they behave themselves, some entertaining these absurdities may hold seats in Congress, and though 'manifest destiny' points to the extinction of the aborigines on this continent they may think we become too willingly, or charge too much for our assistance in this work of the Fates.<sup>43</sup>

Applegate also discovered disturbing evidence that the federal land office at Winchester had encouraged the Canaday faction to kill Dick Johnson. It was at least a fact that the register of that office defended the accused during the preliminary examinations and the land office receiver supplied bail for two of the men.<sup>44</sup>

All of the accused soon obtained bail<sup>45</sup> and the people of the Yoncalla vicinity were disappointed in their efforts to

<sup>43</sup> Applegate to Nesmith, December 3, 1858, Nesmith Papers, Mss 577, OHS.

<sup>44</sup> Ibid., December 26, 1858.

<sup>45</sup> Oregon Statesman (Salem), January 4, 1859.

bring the culprits to trial before the district court. No indictment could be found against them for lack of "competent" witnesses. The inability of Indians to testify once again proved to be an impediment to justice.<sup>46</sup>

Stephen F. Chadwick, who was working on behalf of the federal government to clear up the legal problems remaining in relation to the Johnson family's property, expressed the fear that the murderers would acquire legal title to the farm, which he felt would imply government approval of the killings.<sup>47</sup> Ultimately, Henry Canaday's son-in-law, James Smith, did move onto the farm, and no one, including Chadwick, seemed to know how to stop him under the existing laws. A probable murderer was thus allowed to take full advantage of the extensive labor and improvements of his victim.<sup>48</sup>

Protected by their friends in taking all moveable possessions from the farm,<sup>49</sup> the Indian heirs eventually received a settlement of \$1275.25 for the sale of these items.<sup>50</sup> Dick Johnson's wife hoped to use her share in educating the child-

<sup>46</sup> Applegate to Huntington, June 20, 1863, Huntington papers, Mss 759, OHS.

<sup>47</sup> Chadwick to Nesmith, December 28, 1858, Nesmith Papers, Mss 577, OHS.

<sup>48</sup> Oregon Argus (Salem), February 26, 1859.

<sup>49</sup> Long to Ackerman, January 13, 1902, Applegate Family Papers, Mss 233, OHS.

<sup>50</sup> S. D. Dickinson, "Statement of Dick Johnson Estate," October 4, 1859, OIA, Roll 17, OHS.

ren as Dick had wished,<sup>51</sup> and several years later, after the Indians had long since removed from the community, it was heard that one of the children was indeed attending the Reverend James Wilbur's school at Fort Simpcoc.<sup>52</sup>

In the Oregon Argus of January 8, 1859 a resident of Yoncalla, signing himself "Ipse Meus" (and sounding very much like Jesse Applegate), commented on the irony of Dick Johnson's life and death in a society where justice eluded him:

...How many millions of money have been appropriated by this government in almost fruitless attempts to civilize the North American savage...And yet one of that decaying race...that had the energy of character to battle against fate...must, as in mockery of our boasted philanthropy, be cut down in the midst of his career; because he was an Indian? No!...Because he had property! And neither the vengeance of the law nor the terrors of hell seemed to be arrayed on earth to protect him.<sup>53</sup>

<sup>51</sup>

Drew to Nesmith, February 17, 1859, OIA, Roll 17, OHS.

<sup>52</sup>

Applegate to Huntington, June 20, 1863, Huntington Papers, Mss 759, OHS.

<sup>53</sup>

Oregon Argus (Salem), January 8, 1859.

## CHAPTER XI

### CONCLUSIONS

Toward the close of Oregon's territorial period, Indian Superintendent James Nesmith summarized an aspect of the natives' experience with white mens' justice:

The Indians in this and Washington Territory have always been taught in their intercourse with both the Hudson's Bay Company and the United States Government that all murderers must be surrendered for fair and impartial trial. The Hudson's Bay Company in their intercourse with them so fully impressed this upon their minds that there was never an instance of the murder of their people in which the perpetrators were not surrendered.

The same policy was pursued by our Government in 1849 and 1850 with the Puget Sound Indians for the murder of Wallace and the Cayuses for the murder of Dr. Whitman, in both instances the murderers were given up; fairly tried; and hanged and their tribes expressed satisfaction at the result.<sup>1</sup>

Nesmith addressed these comments to Brigadier General Newman S. Clarke, who may well have wondered why the U.S. Army Pacific Division, of which he was commander, had experienced such difficulty in protecting a society so effective in its dealings with Indians. Nesmith's coupling of American practices with those of the Hudson's Bay Company would have intrigued John Beeson, who recalled in A Plea for The Indians a conversation

<sup>1</sup>  
Nesmith to Gen. Newman S. Clarke, July 15, 1857, OIA, Roll 6, OHS.



with Dr. John McLoughlin: the Oregon natives, in the experience of the HBC Chief Factor, had shown a high sense of justice, and during his many years in the region, Indian behavior had never necessitated the keeping of a standing army by the company.<sup>2</sup>

Of course, the mission of the British in Oregon was primarily one of trade. To the Indian, the HBC servant was a trading partner while the American settler was a disposessor. The problem of land acts preceding treaties poisoned American public relations with the natives and multiplied opportunities for friction between the races. But the fact of two divergent cultures occupying the same disputed ground for a period of several years made necessary some means of dealing with Indian-white disputes. Several methods were available: individuals or small groups could work outside the law, compromising peacefully or resorting to bullets and arrows; members of one race could engage in random reprisals against members of the other; settlers and Indians could engage in organized warfare; courts, both legal and extra-legal, could be utilized to try offenders of one race against the other.

Leaders like James Nesmith, Joel Palmer and Joseph Lane were war makers when they thought it necessary, but since they were also in the business of establishing American ideals of civilized conduct in a new American territory, they were quick to promote the "salutary influence" of courts of law in Indian-white disputes. To a settler menaced by "savages" whose camp-

<sup>2</sup>Beeson, p. 19.

ground he had inadvertently preempted, the situation might be viewed in quite a different light. He could be miles away from any organized civil or military authority and honestly unaware of laws against shooting down Indians. Precedents for legal proceedings in such disputes were rare, and arbitration by Indian agents was not always prompt or satisfactory. If he received newspapers, the settler might be exposed to statements like "the decapitation of every Indian in Oregon would not atone for the valuable lives they have destroyed."<sup>3</sup> All of these factors fostered reprisals, vigilantism and warfare in lieu of legal remedies.

Aside from missionary teachings, the first serious attempt of Americans in Oregon to regulate Indian-white disputes in a more orderly manner was Elijah White's law code. While Dr. McLoughlin and the British had looked to Indian customs as well as Anglo-Saxon tradition in administering justice, the first United States Indian official in the region ignored native practice and assured a doubtful chief that American notions of justice were God's decree.

Such smug confidence was later exhibited in the Wallace and Whitman murder trials where it was assumed that Indians would automatically be awed by the superiority of American law. Actually, the show-trial character of such proceedings, the inadmissability of Indian testimony, and the rareness of prosecution in cases of white offenders against Indians, could lead

<sup>3</sup>Oregonian (Portland), September 15, 1855.

the Indians to only one conclusion: the whites had one law for themselves and another for the red man.

Recognizing Indian discontent on this point, Joel Palmer, in 1854, made it Indian department policy to bring to trial a number of whites charged with offenses against Indians. While Palmer expressed personal outrage at some of the atrocities committed by white offenders, the timing of his policy and some of his statements suggest more pragmatic considerations: the Indian department was charged with treaty-making, and it was imperative to impress on the Indian mind a distinction between the behavior of "bad whites" and the goodwill of the federal government. Trials of white offenders against Indians were to serve as examples, just as the trials of the Snoqualmich and Cayuse defendants in the murders of Leander Wallace and Marcus Whitman had served as examples. The potent object lesson, rather than consistent justice, was still the goal.

But the object lessons provided were hardly the ones intended. The white citizenry showed an unmistakable reluctance to punish its fellows for crimes against Indians. Even the persistence of Palmer in seeking convictions and the efforts of Judge Deady in reminding jurors that red men were human beings with legal rights, carried little weight in the prevailing atmosphere of land hunger and intolerance. The contrast between the "bad whites" and the Great Father in Washington which Palmer sought to emphasize was obscured by the frequency of acquittals and light sentences when the offenders appeared

before the Great Father's judges, and Palmer's subsequent dismissal could only arouse further Indian suspicions of government motives since the superintendent was known as a defender of their rights.

In the case of Dick Johnson, this close mirroring of public opinion and official action in matters pertaining to Indian justice did not occur. Public opinion favored Johnson because he personified white ideals, but in the eyes of the law, he remained a savage. In the vain hope that Congress would eventually legitimize Johnson's land claim, Palmer held off the Canaday faction temporarily by the influence of his position and the support of the Yoncalla community. His successor as superintendent, James Nesmith, was perhaps more realistic: he would only sympathize with Johnson from his "private heart" as the law gave him little authority to protect a mere Indian from the likes of Henry Canaday.

Johnson's anomalous legal position was the result of his refusal to accept a reservation existence. The problems of uncertain land rights and cultural clashes which poisoned Indian-white relations in Oregon were supposedly settled by treaty-making in the mid-1850's. As long as the Indians stayed on their own reserves and accepted the paternal protection of the government, they were, in theory, protected in their treaty rights. By choosing to decline such protection, Dick Johnson remained subject to laws which had operated in the turbulent years which immediately preceded the reservation era. His case allows us a clearer view of how territorial laws and Congress-

ional acts actually applied to Indians since his experience was largely divorced from the distorted or non-existent application of that law which prevailed in a period of warfare and public hysteria. This is especially true since Johnson succeeded, through the flattery of emulation, in ridding himself of the negative image regarding Indians held by many whites in the earlier period. If anything, his white friends sought to bend the law in his favor, and on at least two occasions, threatened to supplement the law through mob action.

While the Canaday faction's crude attempts to pin a charge of murder or arson on Dick Johnson failed, it was clear that in the eyes of the law the Johnson family, not the Canadays, were the deviant element in the community. Segregation of land and of peoples was the direction in which both the law and public opinion pointed during the Oregon territorial period, and even with the prop of public opinion removed, the law could contribute substantially to Henry Canaday's triumph and Dick Johnson's destruction.

Dick Johnson never succeeded in his desire to be a "Boston" because the law provided only two possible identities for him: he could be an Indian and live under reservation protection, or, if he could convince Congress to make him a grant of land, he could be a special exception. As he chose to refuse the former status, and long waited in vain for the latter, he remained virtually a legal non-person. Ironically, because of the disability of Indian witnesses in court, Johnson's death amount-

ed to the non-murder of a non-person.

Had the murders of Dick Johnson and Mummy occurred five years earlier, perhaps a group of Umpquas would have retaliated by murdering Henry Canaday and his family. As it was, however, Dick Johnson's supporters were white men determined to seek justice through their own legal system, a system which then demonstrated, for perhaps the last time in Oregon's territorial period, that it had little provision for Indians who desired only to live peacefully in the midst of their conquerors.

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